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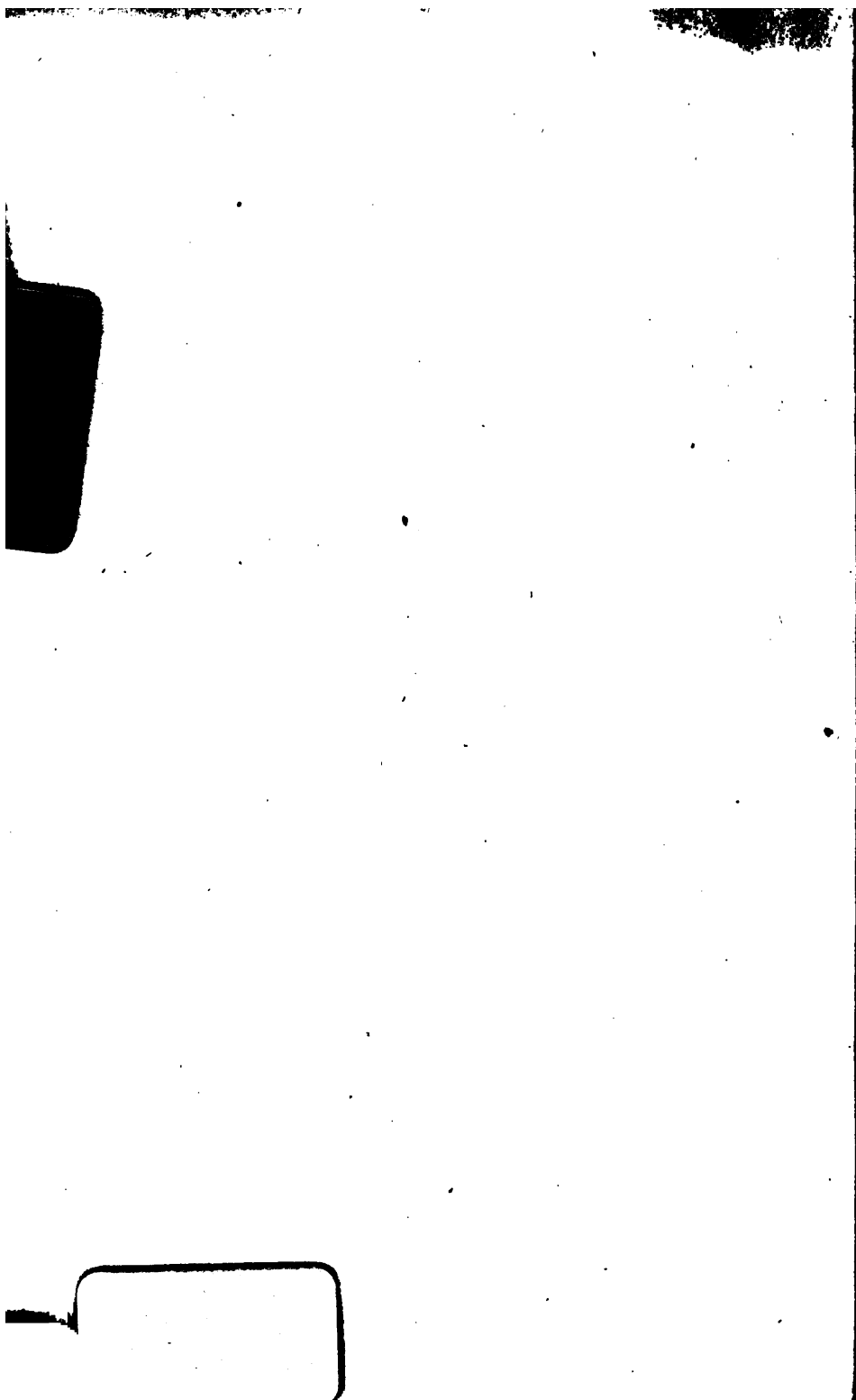
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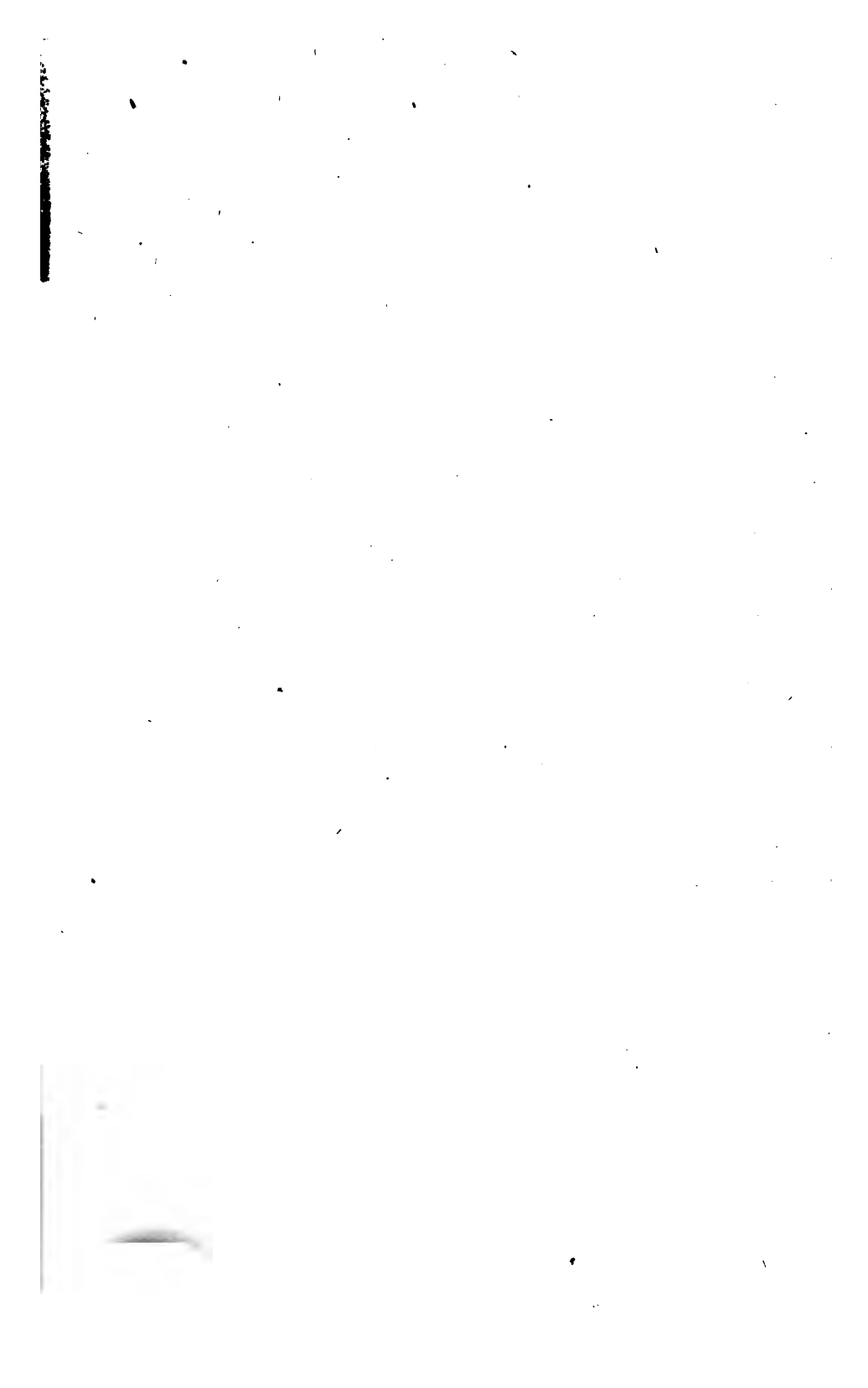
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No. XXIX.

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ART. I.—THE DISCIPLINE OF THE BAR.\*

**E**XCUSES are hardly needed, except such as are personal to myself, for bringing forward before this Society a subject which has attracted of late much attention on the part of the public. That attention has been roused partly by the painful investigations recently held on the conduct of members, who, to the outer world, at least, appeared to be in the foremost ranks of the Bar—resulting, in one case, in the expulsion from the profession of a barrister holding the rank and honours of a Queen's Counsel, a Recorder, and a Member of Parliament; and, in another, also that of a barrister, holding the same honours, in the severe censure by the benchers of his Inn upon his professional conduct; and partly by a recent case which has been decided by the Court of Common Pleas, involving one of the most serious questions which can arise between a counsel and his client.

These unfortunate cases naturally lead us to the consideration of the important question whether the organization of the

\* A Paper by Mr. G. Shaw Lefevre, read at a General Meeting of the Society for Promoting the Amendment of the Law, held on Monday, 2nd Feb., 1863.

Bar of England, which has so long been entrusted to the Societies of the Inns of Court, is effectual in supporting the honour and dignity of the profession, and whether the discipline which the benchers of these Inns enforce, and their mode of proceeding in the cases brought before them, provide sufficient guarantees to the public. In the observations which I shall venture to offer to you on this topic, I shall, for the most part, confine myself to the nature and origin of the jurisdiction of the Inns of Court and their benchers—to the manner in which that jurisdiction is exercised—to some of the principal rules of discipline and etiquette—to the uncertainty of many of the rules themselves—and to the inconvenience thus resulting to the Bar and to the public.

The Bar of England cannot, with any certainty, be traced further back in our history than the 13th century; for it was not till after the Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as previously, the king's person in his journeys through the country; and it was about the same time that persons, no longer of the clerical order, practising as barristers and attending the Court, formed themselves into societies, which were partly intended as seminaries of learning and partly as bodies for the maintenance of discipline among their order.\* Although there is no account extant of the founding of these Inns or Societies, it is certain that, from a very early period, they were recognised by the Courts of Justice, and that to their members was conceded the exclusive right of being heard on behalf of suitors before the judges of the land in the superior Courts of Law. According to the best authorities, these four Inns of Court are to be considered in the nature of voluntary associations, which from time immemorial have had their powers delegated to them by the judges;† they

\* Dugdale's *Origines Jurid.*, p. 141. Fortescue de *Legibus*, chap. 49.

† It has been laid down by a high authority that Courts of Justice have necessarily a power of determining what persons shall practise before them

have no corporate existence—they act under no charters—they are not amenable to any direct interference of the law by *mandamus* or otherwise—but the judges of the land, acting as visitors, have a certain authority over them; and the ancient, usual, and only way of redress to members for any grievance in the Inns is by appeal to the judges.\*

However obscure the origin of these Societies or Inns of Court and their jurisdiction, it is not difficult to account for them when we look back at the early history of our social institutions. We may recollect that in those times every trade or profession was subject to its special rules and bye-laws, either determined and enforced by law or by its own guild or corporation—rules which had in view the education of the members of the trade or profession, the enforcement of honesty among them, the regulation of wages and fees, the prevention of competition, the limitation of their numbers, and other similar objects; but while in most professions and trades these guilds have disappeared, leaving little or no trace behind them but their ancient halls and their large revenues, which are now disposed of in feasting and charity, and while the laws which interfered with the regulation of wages and competition have from time to time been repealed, so far as they affected inferior trades and professions, in conformity with the advance of the doctrine of Free Trade, with the Bar it is otherwise; there the old organization has survived, and some little of its power over its members.

In looking back at the annals of the Inns of Court, we find that, from an early date, the judges, acting in their

as advocates; that in this country this power or duty has been delegated to the Inns of Court; but that in the colonies where there are no similar societies, the power of admission suspending or disbarring Barristers has been rightly exercised by the judges. A case was referred to where the Recorder's Court of Bombay had suspended from practice for six months the whole Bar. See Lord Wynford in the *Justices of Antigua*, 1 Knapps P. C. Cases, p. 267.

\* *Boorman's Case*; March Rep. 177; *Townshend's Case*; 2 Sir J. Raymond's Rep. 69. *R. v. Gray's Inn*; Doug. 353; *R. v. Lincoln's Inn*; 4 *Barnewall v. Cresswell* Rep. 855.

character as visitors, from time to time issued orders, with the consent of the benchers of the Inns of Court, with respect to the discipline of their members. Though far from numerous, these orders appear to have had in view such objects as the special training in learning of their students, the moral and professional conduct of barristers, the due limitation of their numbers, and the prevention of competition.

For example, in 1557, 3 and 4 Philip and Mary, an order of all the Inns of Court was made:

"None attorney shall be admitted. In all admissions henceforth this condition implied, that if he that is admitted practise any attorneyship, *ipso facto*, he be dismissed, and to have liberty to repair to the Inn of Chancery whence he came."\*

Again, in the year 1574:

"Orders necessary for the government of the Inns of Court, established by the commandment of the Queen's Majesty, with the advice of her Privy Council and the Justices of her Bench and the Common Pleas (signed by Bacon, Burleigh, and Walsingham). Imprimis: That no more in number be admitted from henceforth than the chambers of the houses will receive after two to a chamber. Nor that any more chambers shall be builded to increase the number; saving that in the Middle Temple they may convert their old hall into chambers not exceeding ten.

"If any hereafter admitted in court practise as attorneys or solicitors, they shall be dismissed and expelled out of their houses thereupon.

"None to be allowed to plead before the Justices of Assizes except he be allowed for a pleader in the Courts of Westminster, or shall be allowed by the Justices of Assizes to plead before them."†

Again, in the year 1596, it was agreed by all the judges, with the assent of the benchers of the four Inns of Court,

\* Dugdale's Origines, p. 311.

† Ib. p. 312.



that hereafter none shall be admitted into the Inns of Court till he may have a chamber within the house, and in the meantime to be of some Inn of Chancery. That there be in one year only four outer barristers called in any one Inn of Court.

That such students be called who be fittest for their learning and honest conversation, and well given.\*

In another place I find an order which has certainly of late years, though unrepealed, been neglected :

“That no fellow of these societies should wear any beard above a fortnight’s growth.”

In the first year of James I. an order was made, signed by Sir E. Coke, that none be hereafter admitted into the Society of any house of Court that is not a gentleman by descent.†

In the twelfth year of the same king “Orders for the reformation and better government of the Inns of Court and Chancery, agreed upon by the common and uniform consent of the readers and benchers, and the four houses and Courts, which orders proceeded first from his Majesty’s especial care and commandment, and were after recommended by the said readers and benchers, by the grave direction and advice of all the judges.

“For that the Societies ought to give a powerful example of good government in matters of religion, and to be free not only from the crime, but from the suspicion of ill affection in that mind, it is ordered:—That every gentleman of the several Societies aforesaid which shall be in commons at any time within one year after the publishing of these orders, and shall not receive the communion by the space of one year together, shall be expelled, *ipso facto*.

\* Dugdale’s *Origines*, p. 316.

† *Ib.* p. 316; Fortescue de Legibus, p. 111. So also at Rome, under the kings and in the early times of the republic, advocacy was confined to the Patrician order, in whom, however, it was a duty as well as a privilege.

“For that there ought always to be preserved a difference between a counsellor-at-law, which is the principal person next unto serjeants and judges in administration of justice, and attorneys and solicitors, which are but ministerial persons, and of an inferior nature; therefore it is ordered: That from henceforth no common attorney or solicitor shall be admitted to any of the four houses of Court.

“For that the over great multitude in any vocation or profession doth but bring the same into contempt, and that an excessive number of lawyers may have a farther inconvenience in respect of multiplying of needless suits, it is therefore ordered: That there shall not be called to the Barr, in any one year, by readers or benchers in any one Society, above the number of eight.

“That for the time to come no outer barrister begin to practise publicly at any Barr at Westminster until he hath been three years at the Barr.”\*

With the exception of these and a very few similar orders, directed by the judges to the Inns of Court, which are to be found in Dugdale's *Origines*, and which relate, in many cases, to such matters as the dress and general demeanour of members of the Inns, there is no record of any rules for the guidance of these Inns, or for the admission, regulation, and discipline of their members. The existence, however, of these rules is important, as showing that the sovereign, by advice of the judges, and, in some cases, without the consent of the benchers, issued directions for the guidance of the Inns of Court—precedents which it will be well to bear in mind.

All attempt at limiting the number of admissions, or ascertaining the legal qualifications of candidates, has long been abandoned; and, for many years past, almost the only condition of admission to the Inns has been a certificate of fitness and respectability signed by a bencher of the Inn or by two

\* Dugdale's *Origines*, p. 317.

barristers. The admission, however, is subject to the approval of the benchers of the Inn, and they refuse their consent to persons engaged in trade, to those who have taken Holy Orders, to those whose names have not been struck off the rolls of attorneys to Parliamentary agents, and barristers' clerks. It is also understood that they will refuse their consent to any one of whom they have information that he is an unfit person for the profession through some moral disqualification, and from the decision of the benchers refusing admission to any person there is no appeal. There is still no opportunity of reviewing these decisions, notwithstanding the strong recommendations to this effect of the Common Law Commissioners in their 6th Report, 1834. It is still matter entirely within the discretion of the benchers who happen to be present at the time of the application for admission, whether they will consent or no, or what, if any, moral or other qualification they will require.

The student once admitted, three years must elapse before he can be called to the Bar—years which are presumed to be passed in study; but during which, all that is required by the Inns of Court is that he should be present at a certain number of dinners in each term, and attend a certain number of lectures, which latter may be dispensed with, if he prefer running the chance of passing an examination. Except this, which is voluntary, there is no qualification in legal attainments required at the call to the Bar. The Inns of Court, therefore, do not in any way guarantee that their members are in any way fitted for the confidence of the attorneys or the public, in respect of knowledge of the law, or even that they are not absolutely ignorant of the subjects requisite for their profession.

This is still the case, notwithstanding the unanimous Report of a Royal Commission eight years ago, of which the present Lord Chancellor, the present Chief Justice of the Queen's Bench, Mr. Justice Keating (then all practising

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at the Bar), Vice-Chancellor Sir W. Page Wood, Sir J. Coleridge, the Right Hon. Joseph Napier, and, I may add, among others, Sir J. Shaw Lefevre, were members—and who were of opinion that, “as regarded the intellectual qualifications and professional knowledge of a barrister, there was not such security as the community was entitled to require.” The scheme which they recommended has not been adopted, and nothing whatever has been done. Objection may, however, again be taken at the call to the Bar, to the moral qualifications of the student, and the benchers may, if they see good reason, refuse to call him to the Bar. From this decision of the benchers there is an appeal to the judges, but there is no prescribed mode of hearing the candidate before the benchers, or of taking and recording the evidence produced before them. They are simply required to give a certificate of their reasons for refusing to call the appellant to the Bar.

The barrister thus called to the Bar is admitted at once to all the privileges of the profession. He has, in common with other barristers, the exclusive right of appearing for and addressing the judge on behalf of suitors in the Superior Courts; and he has further the privilege, not enjoyed by any other class I believe in the country, of not being liable for any breach of contract, or for any act of negligence in the exercise of his profession, unless such act be tainted with *mala fides*. On the other hand, he has no legal remedy for the recovery of his fees; and, according to the recent decision of the Common Pleas, it is not competent for him to enter into any contract for payment by his client with respect to litigation, either before, during, or after such litigation. He still, however, continues under the authority of the Inn to which he has been called, and is liable to expulsion from that Inn and from the exercise of his profession, at the instance of the benchers of his Inn; or he may have his professional and moral conduct inquired into by the benchers, and sub-

jected to their censorial remarks. The Serjeants-at-law must be excepted from this statement. This ancient body, who for upwards of 600 years, and till within a few years ago, had the exclusive right of pleading in the Court of Common Pleas, is not subject to the authority of the Inns of Court. From the time of receiving his patent from the Crown, which is given only on the recommendation of the Chief Justice of the Common Pleas, the serjeant ceases to be a member of his former Inn. The receipt of the patent was, in ancient times, celebrated with great formality and by a feast in the Inn to which he belonged, lasting for seven days. I cannot ascertain that the serjeants are subject to any rules or discipline of their fellow-serjeants, and there is no precedent for any inquiry into the conduct of one of their members, probably because there never has been cause for such inquiry in that most honourable body. But as the serjeants have lost their exclusive privileges and retain only a certain precedence at the Bar, the dignity is not so much coveted as that of Queen's Counsel; and if it were not that the dignity is not given as a reward for political services, it is not more unlikely that there should arise a necessity for inquiry, than in the case of Queen's Counsel, and it would be well if doubts on this point were set at rest. The judges are all members of Serjeants' Inn, and it is there that they meet to hear cases of appeal from members of the Inns of Court.

I can find no record of any rules laid down by the Inns of Court for the observance by their members who are barristers, and I believe none such exist; nor is there any definition of the particular acts or conduct which will render a barrister liable to expulsion or to the censure of his Inn. It is understood that any gross misconduct connected with his profession, or of such a nature outside his profession, as shows him to be unworthy of trust, will render him thus liable, and also any notorious and continued breaches of professional etiquette. But to what extent this misconduct must be carried before the

benchers will act, is quite undefined and unknown;\* nor are there any well-known or defined rules of etiquette for the guidance of members of the Bar. The Inns of Court are in the nature of a *forum domesticum*, and may inquire into any matter or conduct of their members; and may censure or expel any member, subject, as before, to an appeal to the judges. But it is matter of grave doubt whether there is an appeal, except in the case of disbarment.

The benchers of the four Inns of Court have, from time immemorial, been self-electing bodies, and unrestricted, I believe, as to numbers. It has been usual of late, almost as a matter of course, to elect any member of the Inn who has been called to the bar as a Queen's Counsel; but if three of the benchers present object, the candidate is not elected;† and there are cases in which the newly-made Queen's Counsel has not solicited the honour. The benchers thus elected vary from about twenty in Gray's Inn to about sixty in Lincoln's Inn. As regards the Bar and the public, the only duties of any importance which these benchers have to perform are those before alluded to of admitting candidates as students, calling them to the Bar, and exercising a certain control over them when called.

\* In the case of *Seymour v. Butterworth*, quoted at length in the February Number of the *Law Magazine* for this year, p. 312, Chief-Justice Cockburn thus charged the jury: "I take it to be beyond dispute that if the conduct of a member of an Inn of Court is such as to be unworthy of a gentleman and a member of the profession, he is within the jurisdiction of that forum. We hear of charges in the army of conduct unbecoming an officer and a gentleman; and although there may be no breach of military discipline, yet the breach of individual honour is held to be a sufficient ground for inquiry and for such animadversion as the case may call for. In like manner, if the conduct of a member of the Bar is such as to be unworthy of a barrister, and unworthy of a gentleman, that again is always considered to be a proper matter to be inquired into by the benchers of an inn of court." With all respect for the opinion thus expressed, I venture to say that there is among benchers of the Inns, as also among members of the Bar, great difference of opinion as to the extent of the authority of the Inns of Court; many are of opinion that they have no right to inquire into any act of a member unless it is connected closely with his practice in the profession, while others think that such inquiries should extend to all acts or conduct of a member even beyond his practice in the profession, if they be such as, in the ordinary sense, are unworthy of a gentleman.

† At Lincoln's Inn the majority of benchers present decide.

Beyond these functions, which do not, as now performed, entail much labour upon them, they have no others than to administer their ample funds and revenues, which they have proved before the Commission of 1855 to be no more than sufficient to maintain their libraries, chapels, gardens, and lecturers.\*

In what manner the inquiries into the conduct of members of the Inn are carried out by the benchers is matter of gravest concern both to the profession and to the public. It is understood that such inquiries often take place in an informal manner after dinner, and before such of the benchers as may happen to be present; that evidence is taken by a short-hand writer; that counsel are sometimes heard for the member whose conduct is in question; and that the inquiries are strictly private. They have not, however, it would seem, the power of examining on oath, or of compelling the production of witnesses or documents, nor any of the powers which are ordinarily vested in a Court of Justice. It is uncertain whether they have even the power of questioning a barrister summoned before them as to any alleged act or practice, or of demanding from him an explanation. In the absence of any authority upon this subject, or of any annals of the Inns of Court, open to inspection, we have to fall back upon a casual account of their proceedings, such as has been presented to us in the recent trial arising out of Mr. Seymour's case. Though the circumstances of that case were most peculiar, no one, I think, can come to any other conclusion from it than that, as now constituted, the tribunal or parliament of benchers fails in the qualifications necessary for conducting such important

\* I find in the Report of the Royal Commission of 1855, the income of the four Inns of Court amounted in the aggregate, in 1854, to £57,957 3s. 6d., of which about £36,000 was derived from rents and dividends. The expenditure on their libraries was £2,122; on their chapels, £2,328; lecturers and studentships about £2,000; interest on mortgages £1,300. The remainder was spent in repairs, in their establishments, and in their kitchens. I would suggest that, as a great additional convenience to barristers and students, the libraries should be kept open at least as long as it is light, instead of being closed at 4 p.m., even though this might necessitate the further expense of assistant librarians.

inquiries; not for want of capacity in its members, than whom there are not in the profession men of higher honour and standing, but from the weakness inherent to so informal a tribunal. It is scarcely possible to imagine cases which require greater care and delicacy of treatment than those which involve so penal a conclusion as disbarment; and every possible assistance should be given both to the benchers and to the barristers, whose conduct is in question before them, for the discovery of truth and the vindication of honour. It is obvious that from want of due authority as a constituted Court, there arose the confusion which ended in the action so full of public scandal to the Society of the Middle Temple.\* Complaint has been further made in the public papers by Mr. Digby Seymour, that in his case, of fifteen meetings held by the benchers, in no single instance was the parliament composed a second time of the same members as any previous parliament, and that the numbers attending varied from a maximum of eighteen to a minimum of seven, and that only two members attended all the meetings. Without expressing any opinion on the merits of this case, or whether Mr. Seymour was justified in making this objection, I cannot but think that in an inquiry of so important a nature, such a course, and it has not been contradicted, was very far from being calculated to ensure a proper consideration of the case, either for or against the accused; but it would seem to be inevitable in a body so numerous as the benchers of the Middle Temple, many of whom are barristers in the greatest practice, and who must find great difficulty in attending an inquiry of such length.

Then, again, the charges which were investigated by the benchers were in respect of matters which occurred six, seven, and eight years before the inquiry; they were matters which were known to many members of his circuit, and were generally bruited about in the profession years before

\* This defect was pointed out in the Report of the Royal Commission, and a remedy suggested; no action, however, was taken upon it.



the inquiry took place, and before Mr. Seymour had been raised to the dignity of a Queen's Counsel. I am far from saying that time should be a bar to all charges whatever against a counsel; but where there has been no good cause for the long continued abstinence of the prosecutors, it is matter of serious consideration whether, having regard to the difficulty of proof and disproof, such charges should be entertained. In such cases accusations are unjustly made against the benchers that they take no action till the accused is in position high enough to be an object of professional jealousy—accusations, the groundlessness of which can only be known to the Bar. In Mr. Seymour's case, if the inquiry had been made soon after the commission of the alleged acts, there would have been better opportunities of ascertaining the truth of the matters, and the benchers would have been spared the pain of censuring the conduct of one whom the Government had so recently thought proper to make a Queen's Counsel. It is probable that the delay which took place in this case was owing to the imperfect means which the benchers of his Inn have of ascertaining any information respecting the professional conduct of their members, particularly of those in the junior ranks of the profession; an objection which arises from the constitution of such a tribunal.

Yet another defect in the means which the benchers have of maintaining discipline among their members is brought to light by the difficulty which they appear to labour under of giving publicity to their discussions. In Mr. Seymour's case, the judgment, which was the result of their investigation, was communicated to the public in a document which was screened in the Hall. The document contained no name to connect it with the particular case, and it was only by inference that it could be so understood. In Mr. Edwin James's case, again, the nature of the charges which led to his expulsion from the profession were long withheld from the public, and it was not till some months

after that the public were favoured, through the pages of the *Law Review*, with the true nature of the charges in respect to which Mr. James was condemned. In the meantime, Mr. James had been able to present himself to a public and a profession on the other side of the Atlantic, as if he had been compelled to leave this country on account of pecuniary difficulties only. It is true that the profession here were well aware of what had been the nature of his offences, but not so the general public. It would certainly seem that in cases of disbarment the reasons for it should be made public, for the sake both of the Bar and the public, to justify the one and to protect the other.

Besides the tribunal of the benchers which has thus been described, there is for barristers who join a circuit another quasi tribunal in the Bar mess of the circuit. The admission to the mess is by ballot; and, if the candidate is blackballed, the practice is to appoint a committee to inquire into his antecedents, and to report the same to the mess, upon which the admission is again discussed. The same tribunal asserts the right to inquire into the professional and moral conduct of its members; and, after a report from a committee of inquiry, a discussion takes place, which ends either in censure or expulsion from the mess. It is well understood, however, that the Bar mess has authority only so far as extends to expulsion from its own society, and that it cannot prevent the barrister from practising in the Courts on circuit. Authorities differ upon the question whether it has the right to forbid its members to hold briefs with the expelled member. Moreover, there is not any recognised practice or means of communicating with, or transmitting information to, the benchers of the Inn to which he may belong. The discussions before the mess upon these subjects take place after dinner, and as might be expected, are not of a nature to insure uniformity of practice or much respect for decisions arrived at. Breaches of etiquette often pass unnoticed. It has, however, occurred that the

circuit mess has properly expelled a member for acts against public morals where no action has followed from the Inns of Court, and where it must be presumed either that the benchers do not consider such acts as within their cognizance or that they have no means of receiving information upon matters even of public notoriety.

The various sessions exercise the same kind of limited control over members of their mess.

The penalty which the circuit and sessions mess thus hold out to their members is insufficient; for though men of high feeling generally keep themselves much within the rules of etiquette, and are sometimes over-punctilious in the observance of supposed rules which have no real existence, to men who are without these feelings, the knowledge that nothing more can result than the loss of the Bar society, takes off from the efficacy of the penalty; and to the men who are excluded or who have never been admitted, but who are still free to practise on circuit, there is wanting a powerful check upon malpractices, the fear of forfeiting the good-will and opinion of their fellows.

The offences which are the subject of inquiry before these tribunals, both of benchers and circuit mess, are, as I have already pointed out, of two kinds:—firstly, dishonest conduct, professional or otherwise; secondly, breaches of professional etiquette, the distinction being this, that there is nothing necessarily in itself dishonest or improper in the act which comes under the latter head, but it is forbidden by rule of the profession, because the interest of the Bar or the public so requires; not but that some breaches of etiquette are dishonest—such as the making a secret agreement with the attorney to work off a debt—but the dishonesty is in the secrecy, in pretending to keep to the rules of etiquette, and in secretly breaking them. It will be readily understood, from this division, that it may be neither possible nor desirable to lay down any strict rules as to what particular acts of dis-

honesty should render a barrister liable to disbarment; the discretion is and must be left with the governing body. It would, however, be well if some understanding were come to as to what acts which border on dishonesty, such as insolvency, and also acts of the nature I have before alluded to, should be considered within the category; not, of course, as a matter of warning, but rather for the guidance of those who have charge of the discipline of the Bar. As there is no record kept by the benchers (open to the public at least) of the cases which have come before them, and in which they have exercised their discretion of disbarring, and as no publicity is given to their decisions, no precedents can be appealed to on the subject, except in the few cases where attempts have been made to get the interference of the Queen's Bench by *mandamus*. In *Boorman's* case, a barrister of one of the Temples was expelled the house, and his chamber seized for non-payment of his commons; a course which, I conceive, would hardly be followed now.

With regard to breaches of etiquette, however, I cannot but think the question is very different. It being conceded that the etiquette of the Bar depends upon the rules which custom or expediency requires should be maintained, but the breach or non-performance of which is not in itself matter of dishonesty, it follows, almost as a matter of course, that they should be accurately defined and laid down for the guidance of all, but especially of men just commencing their career. As I have already pointed out, such is not the case; they remain to this day the unwritten laws of the profession, handed down from generation to generation, and altering materially with the custom, practice, and convenience of the Bar. There are certain leading rules of etiquette which have, from long practice, become well known and defined, but there are many others which are ill-defined and ill-kept; some are falling into neglect, others gradually rising into practice.

Much uncertainty prevails with respect to many of them, and the highest authorities differ on points of daily occurrence.

Of the most important rules of etiquette are those which affect the relation of the barrister to the attorney. These cannot be better illustrated than by the judgment of Lord Campbell, in the well-known case of *Bennett v. Hale* (15 Q. B. 171), where a judge, having ruled at *nisi prius* that a counsel appearing for one of the parties, and not instructed by an attorney, could not cross-examine witnesses or address the jury; the whole question was discussed, and a new trial was granted, on the ground, "that though there was an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney, and the Court believed that it was for the benefit of the suitors, and for the satisfactory administration of justice, that this understanding should be generally acted upon, yet there was no rule of law by which it could be enforced; that it being a matter of procedure, the judges, of their own authority, might, according to their view of what was fit, have laid down a general rule, determining under what conditions and restrictions barristers should be permitted to plead before them and have pre-audience, but that no such rule was to be found; that in Criminal Courts it was conceded that the practice for a barrister not to plead, unless instructed by an attorney, did not prevail; and that instances were well known in which, with the sanction and at the suggestion of judges, barristers had defended prisoners without the intervention of an attorney."

With regard to the ancient practice, Lord Campbell pointed out that a change had been taking place in the relation of barrister and attorney: "That the advantage to be derived from subdividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process, and did what

was necessary in the offices of the Court for bringing the cause to trial, and for having execution on the judgment. That he highly approved of the demarcation finally drawn between the functions of the attorney and those of the counsel, and believed that the intervention of the attorney between the counsel and the party had greatly contributed not only to the dignity of the Bar, but to the improvement of English jurisprudence. He earnestly trusted that the almost uniform usage which had prevailed upon the subject for more than a century would not be altered, and that the interference of the judges to rectify any abuse of it would not be necessary. Exceptional cases might again occur, though very rarely, when it might be fit for barristers to plead in civil suits, instructed only by the parties; but he hoped that they would continue generally to adhere to what had been considered the etiquette of the Bar. Although conscientiously bound, and ever ready to render their best assistance for the discovery of the truth and the vindication of right, they were at liberty, under the control of the Courts, to lay down conditions upon which, for the public good, their services were to be obtained."

From this judgment it seems that, in Lord Campbell's opinion, though there was no rule of law to prevent barristers appearing in civil cases uninstructed by attorneys, yet it was against the etiquette of the profession. The judgment, however, does not touch upon the question of chamber practice, and it is difficult to say whether, even in civil suits, the etiquette is still as pointed out by Lord Campbell, for it will be recollected that when the County Courts were first established in 1846, a clause was inserted (9 & 10 Vict. c. 95, s. 91) preventing counsel from appearing in these Courts unless instructed by an attorney; but, subsequently, in consequence of an agitation among some members of the Bar, and very much owing to the exertions of this Society, and the support of Lords Brougham, Lyndhurst, and Denman,

when the jurisdiction of the County Courts was extended from £20 to £50, this clause was repealed. This would seem to indicate that, in the opinion of the Legislature and of the noble lords just named, it is not expedient that in the County Courts, the etiquette of being instructed by an attorney should be maintained, and it is not easy to draw a distinction with regard to the Superior Courts, and much less so with respect to chamber-work. Notwithstanding this, it is certainly the opinion of a large number of the profession that it is contrary to etiquette, and, indeed, in the opinion of many, dishonourable to take briefs from, or to advise, or to receive fees from others than attorneys.

The practice, such as it is, is comparatively modern; for up to quite a late period of our legal history even the minutest part of the duties connected with it were performed by barristers, and it was not till the year 1557 that we find the rule, already quoted, forbidding barristers to act as attorneys, and it is about that time that we must look for the complete divergence of the two professions; but even much later than this the attorney was a mere ministerial officer performing the less important duties of conducting the suit through the forms of the Courts, and all the more important duties were undertaken by counsel, who advised personally with their clients. It is quite of late years that the attorneys and solicitors have assumed the important position which they now hold, and that they have become, in fact, the dispensers of all the business which comes to the Bar. There is, no doubt, much to be said in favour of cutting off the barrister from direct personal communication with the client; it tends to make the barrister more independent of personal questions, enables him to give a more impartial and unbiassed opinion, free from the prejudices which might, perhaps, be instilled into him by more direct intercourse with the client. To men in heavy business, the work comes already half-performed, in being divested of all immaterial matter which

the client is certain to impart to it. It would, indeed, be impossible for a leading barrister to receive his instructions from clients uninstructed in the law; the waste of time in explaining would be too great. There are, however, consequences of an opposite character arising from this rule, which have an important influence on the counsel. I mean that it tends to make the professional prospects of the barrister too much dependent on attorneys' connexion. Of course there are exceptional cases of remarkable talents, which command success, in spite of every difficulty; but, on the average, an early introduction to easy business and familiarity with its forms are almost indispensable, and the opportunities which give rise to these advantages rest mainly with the attorneys, and not with the public; and it is neither unnatural, nor can it be said to be unjust on their part, if these opportunities are given in the first place to relations or connexions of their own whom they know, in preference to strangers whom they do not know. There are not a few great firms of attorneys in the present day who have of themselves sufficient business to support a barrister with work, and it sometimes happens in such cases that a close connexion exists between the firm and the barrister, having its origin in family ties, which has all the appearance and some of the effect of a partnership, the reality of which would be opposed to the principle on which the Bar rests, and contrary to every rule of etiquette in the profession; so true is the old saying, "*Naturam expellas furcâ tamen usque recurrit.*" There are others, however, whose boast it is to pick out the best men they can find at the Bar, regardless of other considerations, and by so doing to contribute in raising them to the bench and even to the woolsack.

Then, again, the attorneys are not themselves restricted from performing the duties of counsel, except before the Superior Courts. In many other Courts, and in many other ways, they practise side by side with barristers, and have



obtained almost the whole of certain branches of work. Almost all the County Court work, which now embraces a considerable quantity of important litigatory work, almost all the Bankruptcy work, a vast proportion of conveyancing, of work before Judges in Chambers, before the Clerks of Chancery Judges, before Masters of the Courts, in references, and at petty sessions—most of it strictly the work of advocates—is performed by attorneys, and without the aid of barristers. It would be a folly in these latter to abdicate any further their proper functions, unless it can be distinctly shown that it is for the interest of the public that such work should be taken from them and entrusted to others. It has been feared by some that if it were proper for the counsel to advise his clients without the intervention of an attorney, and for the latter to be called in when litigation was commenced, it would lead to the counsel naming the attorney instead of the attorney naming the counsel. This is so to some extent in France, where the advocates invariably see their lay clients and where the local Bar in the provinces derive much of their emoluments, by giving advice to their neighbours without the intervention of the *avoué*. It does not appear that any evil consequences follow, or that the Bar is at all lowered in the estimation of the public, or in any of its qualities as compared with our own.

The subject is one of great interest and importance, but cannot now be treated in all its bearings. I have only introduced it to show how important it is that it should be discussed by the Bar generally, and that some rule should be adopted, founded on what is thought to be the interest of the Bar and the public, which I conceive will ultimately be found to be the same. Far from any certain rule at present being laid down, I venture to say that no two benchers, taken at random, will agree as to what are the rules of etiquette regulating their relations with attorneys, and I cannot find that the Inns of Court have ever taken pains to lay down what

should be the conduct of their members. There is, it is true, an Act\* which gives attorneys a monopoly in their own department of practice and protects them with penalties, but it does not point out what their special duties are; they doubtless include serving notices, taking out process, and other similar duties, and perhaps they extend to collecting evidence, copying documents and drawing up the briefs.

I need hardly say, that it is a strict rule of etiquette, and one that would be observed by all men of right feeling, whatever the etiquette might be, that a barrister may not solicit briefs. In criminal cases it is against etiquette to undertake a defence for a prisoner gratuitously or without the intervention of an attorney, except on application from the prisoner in the dock, or by invitation of the judge. The rule might perhaps with advantage be further relaxed, in consideration of the number of cases in which prisoners or their friends are unable to afford the expense of an attorney. That the rule is not invariably kept is apparent, from the complaints which have found their way into the public papers from the Middlesex Sessions of an alleged practice there, of barristers' clerks touting among prisoners and prosecutors, and drawing up briefs for their masters without the intervention of an attorney; and the practice has given rise to much scandal, arising from the angry recriminations of counsel. We have not, however, heard of any attempt being made to inquire into the origin and extent of such a practice.

At the French Bar the rule laid down is, that "It is unworthy of an advocate to solicit business unless in the case of a defence, which he may offer gratuitously to the poor." The advocate is further permitted to have free intercourse with prisoners in the gaols, but he is forbidden to have anything in the nature of an understanding with gaolers or prison agents.

Another rule of etiquette of great importance is that which

\* 2 Geo. II. c. 23.

has reference to the contract between the barrister and his client. In the recent words of Chief Justice Erle, it may be stated thus: "That a barrister may not, by a special contract, made either before, during, or after litigation, bind himself or his client in respect of such litigation." After the decision of the Common Pleas, in the case of *Kennedy v. Brown*, it must be taken that this is not only matter of discipline but matter of law, and that no action can be brought by either counsel or client upon any such contract.\*

The judgment of the Chief Justice, apart from precedent, proceeds upon the ground that "If the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his per-

\* By the rules of the French Bar, as drawn up by M. Mollot, and circulated by the Council of Discipline among their members, it is thus laid down:

"In the presence of ingratitude, which, unfortunately, is too frequent, and ever ready to take every advantage, it is difficult to form any prohibition; and there is no doubt that, in law, an action for the recovery of fees would be maintainable by an advocate. This was an express disposition of the Roman law, and there exist many similar orders of the Court of Appeal. Certain Bars indeed authorise, or at least tolerate it; but in Paris, the rule of the ancient Bar, founded on the disinterestedness which was its characteristic, and according to which any judicial demand of payment of fees was strictly forbidden, under pain of erasure from the table (disbarment), has been religiously preserved. This honours the advocate in the highest degree; it makes his profession unlike any other, and assimilates it to a kind of magistracy. Hence this principle arising from tradition, that the payment of fees must be voluntary on the part of the client, and, as it is said, without the tax or intervention of the Judge."—See "*Mollot, Règle de la Profession*," 141. See "*Anciennes Lois Françaises*," tome i., p. 652, xiv. p. 419, and "*Ordonnance*," 14 Dec., 1810, sec. 17.

As to the Scotch law, see Lord Bankton, 4, 3, 4, who also, on authority of the Roman law, lays down that an advocate may sue for his fees, but that it is dishonourable in him to do so. But see *Shand's Practice*, p. 81. The Roman law depends upon the interpretation of certain passages in the Digest, lib. 50, lit. 13, art. 5, 10, and 12; and I find it impossible to reconcile that of the Court of Common Pleas with that of previous commentators. See the translations of the Pandects by Pothier and Neuville, and by Hulot and Berthelot; by whom the words *si cauta honoraria* are rendered, "if the fees be agreed upon," and not, as by the Common Pleas, in the sense, "if security be given for the fees." See also Grellet Dumazeau sur le *Barreau Romain*, p. 127. The words "*Honoraria honeste accipiuntur tamen inhoneste petuntur*" would seem to indicate, not that fees could not be sued for, but that it was dishonourable in advocates to sue for them. A distinction which is followed in the French law.

formance would be guided by the words of his contract rather than by principle of duty; that words sold or delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion, in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates might be degraded. It may well also be, that if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance, and the rights of attorneys might be sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others that may be suggested, would be unredeemed, by a single benefit, that we can perceive."

The decision is a most important one; independent of the high tone which it takes, it makes it clear, for the first time, that there is no remedy, by action at law, against a barrister, even in the case of an express contract, unless there be *mala fides*, thus overruling what had been previously considered as the law in a judgment of the Court of Exchequer in *Swinfen v. Lord Chelmsford*,\* where it was said: "Upon an express agreement, the barrister would, no doubt, be liable, as any other person or party, to a contract." Again, "We are of opinion that an advocate at the English Bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract expressed or implied. Cases may, indeed, occur where he would be liable in *assumpsit*; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest."

I have dwelt upon this, because, though it is matter of law and not of etiquette, it is well that it should be clearly under-

\* 5 Hurl. and Norm. 921.

stood that the public cannot look for any remedy for breach of contract or duty by the ordinary form of action at law, but must look to the Bar itself to maintain its own sense of duty to the high level pointed out by Sir W. Erle, in a judgment, of which, in some parts, one is tempted to say in the words of Molière,—

“Cette grande raideur des vertus des vieux âges  
Heurte trop notre siècle et les communes usages;  
Elle veut aux mortels trop de perfection.”

When we look at the present practice of the profession, we certainly do not find that entire absence of pecuniary interest, and of anything in the nature of hiring and services, or of bargains between counsel and client as to fees which was the boast of the Bar in times when, by a curious conceit, in imitation of the Roman *patroni*, our barristers wore a purse hanging from the backs of their forensic costume, into which the client might, unseen, put his fee, lest they should be tainted by the handling of money and the discussion of terms; the vestiges of which custom are still to be seen in the purse hanging from the barrister's gown. Whatever ancient rules of etiquette there were on this point have disappeared; counsel, in nine cases out of ten, do not receive their fees beforehand, notwithstanding an ancient etiquette to that effect, (see Bayley J., in *Morris v. Hunt*, 1 Chitty, 544,) “Counsel are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not. It is their duty to take care that they get them beforehand, and the law allows no remedy if they disregard their duty.” It is now a common practice for the clerks of counsel to run up accounts with attorneys for their fees. And again, on the important question of the amount of the fee, it is hardly necessary to state the fact, that the practice has grown up, if indeed it ever was absent, of what amounts to a bargaining between the clerk of the counsel and the attorney as to the fee the counsel will require with the brief; and the client

well knows that if the best man will not take the brief for the fee, which is all that he can offer, there are others, who hold second rank, who will be quite willing to do so; and thus competition of the most unlimited character virtually takes place. I am unable to see how these facts are inconsistent with the highest moral sense of duty in counsel, or the utmost devotion to the interests of their clients, or with the independence and disinterestedness so much to be aimed at. The same can, perhaps, scarcely be said of that which has become not uncommon in recent times, which has been much commented on in the press, and for which the Bar has suffered some unmerited censure. I allude to the increasing tendency of counsel to hold more briefs than they can conveniently give attention to. No doubt great difficulty has arisen from the multiplication of Courts at Westminster and Guildhall, from the judges often sitting at both places at the same time, from the increase of business, and from the manner in which business is brought on in the Courts, making it all but impossible to predict with any certainty when particular cases are likely to be tried. Then, again, the judges take no cognizance of what is going on in other Courts, and rarely postpone cases for convenience of counsel engaged elsewhere; and it often happens that counsel who have but a small business find two or three cases coming on at the same time in different Courts; and much more is this the case with men in larger practice. Cases are often not tried till weeks and months after the briefs are delivered; and it happens also that attorneys often press upon counsel a brief with the knowledge that he will probably be unable to attend to the case, and the brief is often handed over to another counsel with the full consent of the client. In other cases, counsel are retained and briefs delivered with the sole view of preventing them from appearing on the other side, on the principle, it is to be supposed, that "speech is silver, but silence is gold." But making every allowance for these, and it is still impossible to deny that cases

have occurred in which clients have a right to complain, where perhaps they have found neither of their counsel in Court when their case is on, or the places of one or more of them supplied by others who have neither advised nor consulted with them in the case; it is obvious that one such case does more injury to the reputation of the Bar than years of devotion from the great body of the Bar, and gives rise to a complaint that desire for gain rather than a sense of duty are its characteristics. It is truly said that the evil bears its own cure, for if cases are neglected the counsel will lose his client, and clients are more easily lost than gained; but this of course is poor consolation for the sufferer.

Another common defence made for this practice is, that in accepting the brief or fee, the counsel does not absolutely promise to attend to the case, but only to do so if he finds himself able with reference to other business which he has in hand, and that the attorney well knows this, and does not expect the counsel to do more than attend to the cases he may have, as their relative importance requires—an excuse which is based on the supposition of a contract between counsel and attorney, and not on the high theory of duty laid down by the Chief Justice. The ordinary duty implied in taking a brief, must be to hold it, to do the work, and not to give the client an expectancy, or to hand the brief to another. If the Bar were like other professions and trades, and its members were answerable for negligence or for breach of contract, no question could arise upon such a practice, because the advocate who did not attend would, unless some such special contract could be shown, be liable to the consequences of his neglect, and would probably have to pay the costs of the day incurred by postponing the case, if the client did not choose to go on without him, or to adopt the substitute.

The same complaints were formerly made of the Chancery Bar; till, by an arrangement among the leading counsel, who restricted themselves to certain Courts, the practice was

put an end to ; but on account of the accident of the unequal distribution of business between the three Vice-Chancellors' Courts, this was found to be not without hardship to some of the counsel who were parties to it, and the agreement, I am told, has been put an end to, though most of the leading counsel still confine themselves to particular Courts. It is still more doubtful whether by any rule or understanding of this kind at the Common Law Bar, it would be possible to put a stop to what has been alluded to ; but it is almost certain that if there was a really efficient council of discipline open to clients who conceive they have reason to complain of their counsel, we should hear no more of such cases or of the remarks to which they give rise. As it is, it cannot be wondered at that the public, when informed of some of the rules of etiquette, and finding none upon this point, are apt to say that the Bar is straining at gnats and swallowing camels. Among the rules of the French Bar there is one which says, "An advocate should never accept too great a number of causes ; if this surcharge does not indicate avidity, at least it overpowers and stifles talent."\*

At the Common Law Bar when briefs are handed over by counsel to others, and the practice is not without its advantages in presenting opportunities to younger men of gaining experience and clients, it is against the etiquette, I believe, to hand over any part of the fees. At the Chancery Bar, where it has become the practice for men in heavy business to send their chamber-work to juniors, it is usual to give with them half the fees marked on the briefs. Again, at the Parliamentary Bar, where, more than elsewhere, the practice has grown up of counsel holding briefs at the same time in many cases, and where, from the peculiar nature of the work, it is almost impossible that it could be otherwise, there is a very strong feeling against counsel handing over the briefs to others to hold for them, and it is seldom, if ever, done.

\* "*Règles de la Profession d'Avocat.*" Par M. Mollot, R. 14.



Another rule of etiquette is that a counsel is bound to take a brief offered to him. I believe there are a few barristers who are Quixotic enough to consider that under this they are bound to take the brief, whatever the fee may be ; but whatever the etiquette may have been in former times, the practice now is, as far as I have observed, that of the barristers' clerks looking to the fee or to the name of the attorney on the back of the brief, and being guided by these as to whether they will take the brief.

The really important part of the rule appears to me that which binds a barrister to take a brief without reference to the merits of the case, provided he be satisfied with the fee ; so that every case, no matter what its merits, should have its advocate in open Court and have the opportunity of being heard to the best advantage. At the French Bar, where the rules are better defined, if not stricter than with us, it is different ; the barrister there is bound to exercise his discretion as to the facts of the case, and is not to appear in a case which he knows to be bad.

“In civil matters, if a cause appears to be bad or unjust, an advocate will decline it without hesitation, even should he have advised thereon or accepted it under error.”\*

It is needless to say that the French Bar is in every way as distinguished as our own for independence and disregard of consequences, and has been so under governments often despotic, and presenting difficulties and even danger to their personal and professional well-being, far greater than ours has ever had to bear ; but it is still a question whether the rule of the English Bar on this point is not the better one.

Again, there is a rule of etiquette, that fees under a guinea for a junior and two guineas for a leader shall not be accepted by the profession, thus fixing a minimum—a minimum which is so low as not at all to affect the leaders nor even the juniors in civil cases, as it is rare indeed to see a brief in

\* Mollet, R. 38.

a civil case with a fee less than two guineas. But it is otherwise in pleadings and in criminal cases at Sessions and at the Old Bailey; in these the greater number of briefs are marked with no more than one guinea, at which the cases are certainly not underpaid. I am told it is notorious at some of these criminal courts, that there are barristers who are in the habit of taking fees of less amount than the recognised guinea, and who either take briefs in the lump for a smaller sum, or, having their briefs marked with the guinea, receive something less. I need hardly point out the dishonesty of thus pretending to adhere to the rule, and, *sub rosa*, defeating it; but it is worthy of consideration whether the majority of criminal prosecutions and defences are not over-paid at one guinea, and whether it would not be well to do away with or to alter such a rule. It would, perhaps, be said you will let in competition, which will destroy the *morale* of the Bar. Competition has, as I have shown, its full effect upon leaders at the Bar and others for a maximum, and there is no reason why, in principle, it should not be also allowed as to a minimum; and the *morale* of the Bar at the Sessions, where such practice referred to is carried on, is more injured by the rule than it could be by its absence, for it has the effect of taking the smaller work from the hands of those who cannot secretly do what openly they may not do, and has put it into the hands of the less scrupulous. To most men who go to Sessions, or undertake criminal work, the fee is matter of small consideration indeed; it is the practice, the opportunity of speaking in Court, of examining and cross-examining witnesses, which they seek, and by which they hope to rise into better business: and if it were the recognised rule that sums under a guinea might be taken, there would be no compunction in honourable men taking the lesser sum. There is a large amount of chamber work in the nature of pleadings, done by special pleaders, men who, though just below the Bar, are generally on their way to it, and who are not above

taking half-guinea fees; and there is no reason why this work should not also be open to them and others when called.

At the Parliamentary Bar, which, in many respects, is very different in its practice and etiquette to other branches of the profession, and which much more nearly approaches to a free profession, the minimum fee for both leaders and juniors is fixed at ten guineas per diem, and five guineas for a consultation. These fees were probably fixed at a time when cases before Committees were few, and it was necessary to tempt men away from other work by high fees. Now that the business is so considerable, and a numerous Bar has been formed who do little other work, it would be better, both for the public and the Bar, if the amount of these refreshers were left, as the fee on the briefs, to be settled by arrangement between counsel and client. The fees on the briefs are low in proportion to the refreshers, which is at variance with what is the case at other Bars. It is possible that the often needless length of the inquiries has some reference to this fact.

Another rule of etiquette which affects barristers on circuit is, that a barrister having chosen his circuit, must not, after three years, remove to another, and may not accept a brief on another circuit except for a special fee of 300 guineas for a leader, and 100 for a junior, and 50 in a criminal case. The rule is grounded on the principle of prevention of competition. It is with a view to keep circuits distinct, to protect those who have secured a certain status from the inroad of dangerous rivals, and to prevent the inroad of barristers upon small circuits to carry away the large prizes, and so forth. The amounts of these special fees were probably fixed at a time when the expense of getting from one part of the country to another was great, and much time was lost on the way. There is little to be said in favour of such rules at the present time. They are framed with little regard to the public, whose direct interest it is, to have the most ample choice of men,

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and at the smallest fee for which they can be induced to undertake cases ; and still less are they in the real interest of the Bar, who are yet more concerned in having the largest field open for their professional careers. Of the same nature are rules prohibiting barristers from travelling in coaches or stopping at hotels, which seem to have been framed to create needless expense, or were made in times when there were fewer family ties than now between barristers and attorneys, and are out of date in these railroad days.

A rule of etiquette that barristers shall not refuse to hold briefs with one another, and shall not attempt to interfere with the attorney's choice of junior or leader, is one which is beyond criticism, and is, I believe, universally observed.

There are other rules of etiquette relating to precedence, which are by no means unimportant, with reference to the general organization of the Bar, and with reference to a very important question as to the appointment of Queen's Counsel. It is against the etiquette for a barrister to hold a brief as junior to one who was called after him. It is the etiquette for a leader to have a junior to him in all cases in which he appears for the plaintiff in a suit, but not so when he is instructed for the defendant. I will only mention that there has been some tendency to a departure from the rules as to precedence of juniors in the freer practice of the Parliamentary Bar, but without any notice being taken of it by any of the Inns of Court.

Besides these rules to which I have adverted there are many others which I have not adverted to, as presenting no subject of remark or objection ; there may be others of which I am not aware, for there is nowhere to be found any written collection, nor is there any publication which takes notice of rules of the Bar. Nor can I find that the Inns of Court have ever defined or collected them for the guidance of their members.

It is among the younger members of the Bar—among those

just pushing into business at Sessions, and at the smaller *nisi prius* Courts, that the greatest care should be taken in enforcing those rules of etiquette that are considered to be really essential to the dignity of the profession and the protection of the public; for it is at this stage of their practice that their professional habits are formed, and also it is generally for the purpose of getting an attorney connexion that breaches of etiquette are contemplated; when this is formed, the counsel who has risen thereby is only too glad to keep to the rules, and to enforce them against others who are following his example. Though the profession is full of the most honourable men, and of men of the highest order of intellect, yet it cannot be denied that, from the days of Scroggs, Trevor, and Jeffreys to those of Edwin James, there have been cases in which men unincumbered with scruples have risen in it; and it must be borne in mind that to be known as an unscrupulous counsel, insures of itself a certain amount and class of business; for it is often convenient to men of the same feather among the attorneys to shelter themselves behind the opinion of a barrister, and they naturally look out for one who understands a wink or a nod. Rules forbidding actions not in themselves wrong, or enjoining a particular course which would not otherwise be adopted, will, if they are not strictly enforced, become obstructions only to scrupulous men; to the unscrupulous they present no difficulties; on the contrary, they offer means of advancement. It is for the sake of men who would avoid even the slightest approach to anything which might be considered as a breach of an honourable understanding in the profession that all rules which are really necessary should be enforced. It is on the same principle that I would urge that the rules of etiquette should be as few as possible, and that all rules at present existing, which cannot be supported on good and sure grounds, should be abolished. In the words of Lord Denman, "we may safely lay this down as a rule, that all interference of authority with the freedom of actions, not in them-

selves wrong, is to be avoided as an evil, and one that most commonly aggravates whatever evil it was designed to correct. The *forum domesticum*, to which the profession paid allegiance as a band of brothers, can hardly maintain its authority over a family so widely diffused, so indefinitely multiplied. Without rules the honourable man will act correctly, and none will restrain those of opposite character." \*

Now, it certainly would seem to be desirable that the governing body of the Bar should have some discretion vested in them of amending or altering the rules of etiquette, of abolishing such as are no longer of any use, and, perhaps, of establishing new rules. But under the present constitution of the Inns of Court that would be impossible. They have no such power; the utmost they can do, individually, is to take no action upon the breach of a particular rule. They have no common union; each is a separate and distinct body. I cannot ascertain that the benchers of the various Inns systematically, or from time to time, examine into the practices which are growing up at the Bar, or exercise any regular supervision over the conduct of their members. It is not, so far as I am aware, the duty of any one bencher in particular to collect information; and where, as in the case of Lincoln's Inn, there are upwards of sixty benchers, what is anybody's duty becomes nobody's duty.

I cannot ascertain that it is the course for the benchers of the Inns to entertain or receive any complaints of their members from the public or from clients who have reason to complain of the conduct of their counsel. With the French Bar the rule is thus laid down:—"The ministry of the advocate being independent, he is no more responsible for his opinion than the judge for his sentence; he is neither liable to disavowal or exposed to an action for damages. The client can only question the conduct of his counsel before the council of the order." †

I have now described the nature of the government of the

\* Letter to *Law Review*, vol. xvii. p. 69. † Mollot, Règle 57.

Inns of Court, the authority which they exercise over their members, and the nature of some of the rules of etiquette. I think there are few who will not agree with me in the conclusion that, as now constituted, the Inns of Court are unable to effect that which is their principal object—the maintenance of discipline among their members.

It has been seen that they have not established any standard of professional knowledge in members on their call to the Bar. They do not systematically enforce such rules of etiquette as are certain, or ascertain and make known the less-known rules; while in the cases which do from time to time come before them, there is not that security which there ought to be to the Bar and the public, that the cases shall be fully and properly investigated. And, again, the fact that there is no unity of action between the four Inns, and nothing like a representation of, or special responsibility to the general members of the Bar, militates greatly against the use which they might make of their position. A great want of the Bar, as now constituted, is some body which shall represent their interests in the numerous subjects which from time to time arise affecting them; such, for instance, as the legal education of the Bar—one of the most important subjects, which has only been alluded to in this Paper; the concentration of the Law Courts, on which it would be most desirable that the opinion of the Bar should be taken and expressed; the re-distribution of circuits, a question which is most urgent, and which seriously affects the interests of one half of the profession; and, lastly, upon all those questions of etiquette which I have already alluded to.

It has been proposed to substitute a central body, chosen by the benchers of the separate Inns,\* on the plan which has already been tried in the Council of Education, the result of which cannot be said to augur much energy or

\* A bill has been brought into the House of Commons by Sir George Bowyer with this object, and the Solicitor-General has intimated that the Inns of Court themselves are contemplating some movement in this direction.

success; but although a council thus formed would consist of men of the highest position in the profession, and would remove many difficulties now existing, such as the want of unity of action and concentration, yet it would still be open to the objection of not representing the great body of barristers, and of remoteness from the scene of operations of most barristers, and it would be unable to deal with rules of etiquette as suggested; I cannot, therefore, but think that it would be better to adopt a system founded rather on the example of the French Bar. Barristers in France are not, as with us, concentrated at its capital; in every town where there is a tribunal or court of appeal, with business enough to support a Bar, there is established a distinct society of advocates, each having its separate government and discipline—but they are all modelled upon the same plan and with the same rules, and an advocate practising at any Court in France, inscribed on its *tableau*, is free to hold a brief at any other Court.\* The Bar of Paris, which serves as a model for the rest of France, is governed by a council of twenty-one members, elected annually by the whole body of advocates inscribed on the *tableau*, and presided over by the *batonnier*, who is also elected by universal suffrage for two years.

The council thus formed has under its control the discipline of its members, and is able to warn them, to reprimand them, to suspend them from practice for not more than one year, and to disbar them; it has also the power of ordering restitution of fees. From the decisions of this council a collection of rules has been made which is circulated among members of the Bar, and which is an authority upon all matters of etiquette.

\* The Court de Cassation at Paris, the court of last appeal from every other court in France, is an exception to the rule; it has a special limited Bar of its own, consisting of 60 advocates, who have exclusive audience there, and are not permitted to practise elsewhere. These advocates are permitted to sell their places, and large sums are given for the right to practise in this court. They have an organization and discipline of their own. Although they embrace among their members men of great ability, yet the best men of the profession, the Berryers, and the Jules Favres are to be found, as might be expected, in the more open competition of the lower courts.



These rules are framed upon the same principles and with the same intent as the better part of the unwritten, half-known rules of our Bar, and are more strict only in the sense that they are better defined, and more carefully enforced. As such, they are well worthy of the consideration of our Bar.

It would be quite possible, and I believe advisable, to organize a council for the Bar of England upon a similar plan to that here described. Some difficulty might arise from the great number of members of which the Bar is now composed; but it must be recollected that though more than 4,000 names are inscribed as barristers in the *Law List*, and are members of the Inns of Court, no more than 1,500, at the outside, can be called practising barristers in the sense that they go circuit or occasionally attend the Courts with or without briefs.\* Of these the larger half are at the Common Law Bar, and for the most part join a circuit. It would be feasible to form a council, the members of which should be chosen in part by barristers practising in the Chancery Courts, and in part by those attending each circuit—say, one or more representative from each circuit, from each Court of Chancery, from the Parliamentary Bar, from the Divorce Court, and from the Old Bailey, barristers having liberty to inscribe their names at which Court they prefer for the purpose of these elections.

A council thus formed, and electing its own president, should be entrusted with all the duties which are now in the hands of the Inns of Court, and should have absolute control over the admissions to the Bar and the discipline of its members, subject, as now, to an appeal to the judges. It would be proper that they should have definite times for meeting, and should be held responsible for the conduct and government of the Bar. They might, further, be entrusted with power to

\* There are 4,260 names in the *Law List*; of these 1,501 are marked as members of circuits, or as having chambers near the Inns of Court; a further deduction of at least one-third must be made in respect of men who are not in earnest pursuing the profession; of the remaining 1,000, I doubt if there are more than from 400 to 450 who are making, by their practice at the Bar, an income, say, of £500 per annum; of course many of these are making considerably more, and some few are realizing large fortunes.

ascertain what rules of etiquette are now in existence, and, at all events, their decisions might form precedents for the future. These rules should be as simple and as few as possible, as consonant with general principles of free action for barristers as is possible, having regard to their *status*. I venture to think that the council should not have power absolutely to disbar a member, but that this power should be vested in the judges on application and prosecution of the council; much as the power of striking attorneys off the rolls is now exercised by the various Courts; but that the council should have power to conduct a preliminary investigation, with a view to instituting such proceedings, and should have the power of calling witnesses and examining them on oath, of taking depositions, of causing production of documents, of questioning members called before them, and should have all the privileges of a subordinate court of justice. The council might be further assisted by smaller councils, chosen by the different Circuits and Courts, and presided over by the members representing the Circuit or Court in the head council, and reporting through them. These smaller councils should determine on all the minor cases, subject to an appeal to the head council.

It may be asked what right has the Bar, as a body, to enforce a discipline among its members, to inquire into their conduct, and to lay down rules for their guidance; the answer is, that it is not a right but a duty, which is founded on the privilege which the Bar enjoys of an exclusive audience in the Courts of Law, and of immunity from actions against their members for breach of contract, or for ignorance, negligence, or mistake. It is these on which the whole foundation of the Bar rests, and which render the profession so different from any other. As long as these are their privileges, it is their bounden duty to offer some guarantee to the public that honourable and trustworthy men only are members of the profession; that the further privileges of speech and cross-examination of witnesses will not be abused; that they are individually worthy of confi-

dence; and that such rules as are necessary for the maintenance of the order and for protection of the public will be kept. I may go further, and say that they are bound to provide some test, so that ignorant and ill-educated men will be unable to obtain entrance to the profession. If it were not for these privileges and immunities there would be no such duty cast upon the members of the Bar.

Let it be remembered that there are not wanting those who consider that the organization of the Bar is, in itself, abnormal and unwarranted by true economical principles. It is urged that there is no good reason why the Bar should be separated as it now is from other professions, whether cognate to it, as that of attorneys, or not, protected by immunities, endowed with privileges, and intrusted with duties. They would advocate throwing open to any person whatever the right of addressing the Courts, either on his own or any other person's behalf. That the feeling of the age and the Legislature, with regard to other professions and trades, is in favour of such a course. That the profession is of no greater importance than many others which are not protected. That there is no intelligible reason why barristers should not be responsible, for all other professional men are bound to possess the degree of skill necessary to manage the business they undertake with safety to their employers. That as to the question of payment, which is correlative to that of non-liability, there is no reason why the ordinary laws of supply and demand should not regulate it, and that a barrister is not degraded by making a bargain as to the fee to be paid him any more than any other professional man; and that practically it is so, and has been so ever since the Cincian law fell into disuse. That there is no fear of the business of the Bar falling into the hands of ignorant men, as it is work of the highest order, and it is only by great study and long practice that men can render themselves fit for it; and that the Bar rests on no such flimsy basis as that it is liable to have its business at any moment taken away from it by opening the doors of the profes-

sion. That the public is the best judge in this, as in any other profession, of whom they will employ; and that the experience of other professions shows that the public will not employ either ignorant or dishonest men. That there is no reason why a dishonest man should be by public law prohibited from employing his talents in the way which he best can, so long as he can find persons who will employ him. That any rules for discarding dishonest men in a large profession become of necessity inefficacious, only tend to lull the public into a fancied security, and that it is impossible by artificial means to raise the tone of the morality in any particular profession above that of others in the same social order. That if there are men outside the present profession who are fit and able to perform the work, it is neither right nor beneficial to the public that they should be debarred from doing so. That any rules, such as those fixing a minimum rate of fee, or for confining barristers to certain Courts and circuits, are attempts to keep up the rate of wages and to prevent competition; which are unworthy of the age, opposed to all true economical doctrines, and as ineffectual as they are unnecessary. That the only true course is to leave it open to both the barrister and the public to make such bargains as shall seem good to them.

The answer to those whose views are thus briefly and baldly stated, and who, relying on the soundness of the general principles of political economy, are averse to all artificial restrictions on professional employments, is, that to render these general principles applicable, we must abandon the high ground upon which the profession of an advocate has been placed in most countries, both ancient and modern, which have reached a high degree of civilization. That not only in England, but in Rome, and in those countries which have derived their law from the Romans, the *status* of an advocate has not been merely that of a man selling his legal knowledge and eloquence to his litigatory customer, but the advocate has been regarded—to use a metaphorical expression—as a priest in the Temple of Justice—as having duties of a grave and elevated

character beyond the interests of his clients, the duty of promoting the great objects for which laws are established, the protection of right, the redress and punishment of wrongs. That the regulations which form the discipline of the Bar, however imperfect they may be, or however insufficiently administered, have been decreed for a high and noble purpose; to preserve the honest independence of the advocate; to prevent him from being sullied by mercenary considerations; and to ensure that, in advising or defending his client, he should act as having a public as well as a private duty to perform. And further, in the words of Chief Justice Erle, "Looking to the power and privileges entrusted to counsel, it is of the last importance that his sense of duty should be in active energy, proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve where he has undertaken an advocacy, his words and acts ought to be guided by sense of duty; that is to say, duty to his client, binding him to exert every faculty, and privilege, and power, in order that he may maintain that client's right, together with duty to the Court and himself, binding him to guard against abuse of the powers and privileges entrusted to him, by a constant recourse to his own sense of right."

The whole question thus suggested is of the highest theoretic interest, but is, in a measure, beyond the present inquiry. It must be obvious, however, that the answer thus given to the theorist is insufficient, unless it can be shown that there is within the Bar itself a power of enforcing discipline of its members, and of carrying out its rules, sufficient to prevent it from relaxing into the state of absolute freedom so much dreaded, and to supply the place of the legal consequences which would follow in other professions which have no such privileges and immunities.

In conclusion, I have only to say that it must not be supposed, because I have pointed out some of the weak points in the organization of the Bar, and have had occasion to advert to the practices of some of its obscurer members, that I would

either wish or venture to speak slightly of its members as a whole. I believe the Bar of England was never more full of men of the highest honour, probity, and learning. The generation has hardly yet passed away in which it gave us such men as Romilly and Brougham, Denman, Lyndhurst, and Campbell, and it has now among its ranks men who will be no unworthy successors to these. It would be idle in me to add to the noble vindication so lately made for the Bar by one who is himself an exemplar of all that is most eloquent, honourable, and dignified in the profession.\* If there have been some of late, of unenviable notoriety, who have, unfortunately, been permitted to rise to a high rank, which has cast a momentary shadow on the reputation of the Bar, it is owing, I believe, to a laxity of discipline, the result, not of want of principle, but of confidence and forbearance.

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## ART. II.—THE RIGHTS, DISABILITIES, AND USAGES OF THE ANCIENT ENGLISH PEASANTRY.

### PART VI.—*Taxation, Purveyance, and other Grievances.*

THE thirteenth century was a critical epoch in English history. It beheld the introduction of a number of constitutional changes. Up to that age the tenants had lived under their landlords, and were seldom reminded of their sovereign's existence. The government was chiefly supported by manorial assessments, and even the duties payable to the king—excepting irregular exactions, such as Danegeld—were rather seigniorial than regal perquisites. The ancient tallages were not abolished through the king's generosity: they had been levied by other lords, not by the king alone, and every king since the Conquest had been anxious to monopolize the power of taxation. A general tallage was apparently made

\* See the speech of Mr. Serjeant Shee, in the case of Seymour v. Butterworth.—*Law Magazine*, vol. xiv., part 2.

for the last time in the year 1220; its amount was two shillings upon each plough. In 1255 Henry III. proposed to raise *Horngeld*—a tax upon kine—but could not get the consent of his barons. Before the time of Henry III. a tax upon moveables began to supersede the tallage. The rate of the new impost varied: it was a seventh, a ninth, a tenth, a thirteenth, a fifteenth, a twentieth, a thirtieth, or a fortieth part of the value of all moveable property. We are told by the Burton annalist that England was *thirteenthed* in the year 1207. After a time the tax was called the “fifteenth;” a tenth being usually taken from the cities, and a fifteenth from the rural districts. In the year 1189, the declared object of the tax was to promote a crusade; in 1207, to recover Normandy; in 1224 and 1297, it was paid in return for the king’s confirmation of the charters; in 1289, for his expulsion of the Jews; but whatever the pretext of the levy may have been, the people were at first assured that it would be a temporary charge. In this respect it was like our blessed income-tax. There were certain exemptions: in the year 1232, persons with goods under the value of fifteen pence—in 1294, persons with goods under the value of ten pence—were not taxed. There were other exemptions, but they were hardly in favour of the rustic population.\* The return of the fifteenth of all moveables in the borough of Colchester and adjacent townships, for the twenty-ninth year of Edward I., comprehends clothing, bedding, linen, money, furniture, tools and utensils, wool, grain, suet, lard, firewood, seacoal, animals of the farm of all kinds, excepting poultry.† We may presume

\* Bartholomew Cotton, 178, 254. See also Harl. 1885, f. 75—The Chronicles of Roger Wendover, Thomas Wikes, and Walter Hemingburgh—The Annals of Burton and Waverley.

† Two or three entries may be translated from the Rolls of Parliament, 243—

Geoffrey Leyston had on Michaelmas Day 1301 i bed worth ii<sup>s</sup> ii young pigs worth xii<sup>d</sup> each. No other chattels.

Summa iii<sup>s</sup> Inde xv<sup>m</sup> iii<sup>d</sup> qū.

Nicholie Colbayn had . . . ii brass vessels worth xxv<sup>d</sup> i bed unsound worth ii<sup>s</sup> vi<sup>d</sup> i gown unsound worth v<sup>d</sup> i heifer worth iii<sup>s</sup> vi<sup>d</sup>.

Summa xiii<sup>s</sup> Inde xv<sup>m</sup> x<sup>d</sup> ob’.

that fowls were free, for we cannot believe that the people of Greenstead, Lexden, Mile-End, and West Donyland, had none of them in the year 1301. The fifteenth was considered a very great grievance. It was called a constant plague over-running England every year, compelling the poor to sell their pots and pans, cows and clothing, and bringing to the ground many who had been used to sit upon benches. It was often unfairly collected. The tax of 1268 or 1269 was not taken up until the next year had advanced, when the farmers, with empty barns and diminished stocks of cattle, were required to pay a percentage upon the goods which they had owned at the preceding Michaelmas. There was much fraud and embezzlement in the collection of this and the other duties, and much more was levied than ever reached the king. The wool-gatherers are said to have detained two or three stone of wool out of every sack.\*

Purveyance, or the collection of supplies for the royal household, was another hardship. Until the purveyors were compelled by Act of Parliament to take corn by stricken measure, they used to buy corn by heaps, and acknowledge it by strikes; and thus a farmer giving them twenty-five quarters

William the Miller had . . . in cash xiii<sup>s</sup> iv<sup>d</sup> in treasure i silver buckle worth ix<sup>s</sup> i ring worth xii<sup>d</sup> in his chamber i gown worth x<sup>s</sup> i bed worth iii<sup>s</sup> i cloth worth ix<sup>s</sup> i towel worth vi<sup>d</sup> in his kitchen iii brass utensils worth iii<sup>s</sup> viii<sup>d</sup> i andiron worth vi<sup>d</sup> i trivet worth iiiii<sup>d</sup> in his granary i quarter of wheat worth iiiii<sup>s</sup> i quarter of barley worth iii<sup>s</sup> ii quarters of oatmeal worth ii<sup>s</sup> a quarter ii pigs worth v<sup>s</sup> each ii young pigs worth xviii<sup>d</sup> each i pound of wool worth iii<sup>s</sup> faggots for firing worth ii<sup>s</sup> vi<sup>d</sup>.

Summa lxiii<sup>s</sup> iiiii<sup>d</sup>. Inde xv<sup>ss</sup> iiiii<sup>s</sup> ii<sup>d</sup> ob<sup>s</sup> qū.

Catherine Alman had . . . i bed worth ii<sup>s</sup> ii bushels of rye worth iiiii<sup>s</sup> ob<sup>s</sup> the bushel ii bushels of barley worth iiiii<sup>s</sup> ob<sup>s</sup> the bushel i cow worth v<sup>s</sup> i young pig worth vi<sup>d</sup>.

Summa ix<sup>s</sup>. Inde xv<sup>ss</sup> vii<sup>d</sup> qū.

\* Ore court en Engleterre de anno in annum,  
Le quinzyme dener, pur fere sic commune dampnum,  
Et fet aualer que soleyent sedere super scamnum;  
E vendre fet commune gent vaccas, vas, et pannum . . .  
Une chose est countre foy, unde gens gravatur,  
Que le meyté ne vient al roy, in regno quod levatur . . .  
Uncore est plus outre peis, ut testantur gentes,  
En le sac deus pers ou treis per vim retinentes.

(Wright's Political Songs. Camd. Soc. 183, 184.)



of corn was credited for no more than twenty quarters. The very name of purveyor became odious, and was changed into chatour or achetour.\* The purveyors did not pay cash for the goods taken by them, but gave wooden tallies, for which the farmers were to receive money at a future time. The peasants complained that their corn, cattle, and poultry were carried off, and that they received nothing but sticks instead. They could only describe their state of oppression by the use of whimsical metaphors; they declared that they were pinched, and peeled, and wrung, and picked clean, and plucked without scalding. The king's men—whether tax-gatherers or purveyors—went round the country in parties of eight or nine, turning the farmers out of doors, carrying away their stock, and outraging their wives and daughters.† We should observe, however, that these outrages are reported by the disaffected. Libels and political invectives are not to be credited entirely. The daily records of the nineteenth century are full of evils and grievances, but we know that a picture drawn from such materials would be an unfair presentment of the condition of England.

There were plunderers pretending to be purveyors or tax-gatherers: they were checked by an Act ordaining that all the king's takers, purveyors, and catours should carry the king's seal.‡ Under a weak sovereign, unlicensed collectors of

\* . . . ont pris les bledz a meyndre value qils ont valuz et auxint ont pris xxv quarters de bledz pur xx quarters pur ceo qils ont mesure chescun bushell a coumble. (4 Ed. III. c. 3; 5 Ed. III. c. 2; 36 Ed. III. c. 2.)

† I am so pyled with the Kyng,

That I most fle fro my wonyng,

And therefore woo is me.

I had catell, now have I non;

Thay take my bestis, and don thaim slon,

And payen but a stick of tre.

("King Edward and the Shepherd," in Hartshorne's *Ancient Metrical Tales*): not printed for the first time; there are black-letter fragments of it at Lambeth. Compare with it Wright's "*Piers Plowman*," 68.

‡ 28 Ed. I. c. 2.

Zet cometh budeles with ful muche bost,

Greythe me selver to the grene wax . . .

(*Political Songs*, 149.)

Jack Cade's followers complained of amercements called the "greene

course abounded, and regular takers became more than usually troublesome. Towards the end of the reign of Richard II.—

"A stop was put to all traffic, for merchants dared not travel for fear of being robbed. The farmers' houses were pillaged of grain, and their beeves, pigs, and sheep carried away, without the owners daring to say a word. These enormities increased so much, that there was nothing but complaints heard. The common people said, 'Times are sadly changed for the worse since the days of King Edward of happy memory. Justice was then rigorous in punishing the wicked. Then there was no man in England daring enough to take a fowl or sheep without paying for them, but now they carry off all things, and we must not speak. . . .'"\*

We should suppose that the husbandmen, in the civil wars which ensued, suffered as much, at least, as the general population; though we may doubt whether they were strong partisans of any dynasty. When Queen Margaret's army ravaged the southern counties in 1461, sacking corn, cattle, and household stuff—even tearing meat from the spits—we do not believe that a farmer, whose home had been so stripped, began to swear by the White Rose; we should rather think that he growled out, "A plague on both your houses!" In like manner, the chubmen of the seventeenth century, who fortified themselves against Cromwell in the old Roman camp at Shaftesbury, did not pretend to be cavaliers; they professed to care only for their goods.

"If you offer to plunder or take our cattle,

Be assured we will bid you battel"—

was the legend upon their banner.†

wax," more in sums of money than can be found due of record in the King's books. (2 Holinshed, 633.)

Officers, cryers of fee, and marshals of justices in Eyre . . . . there is a greater number of them than there ought to be, whereby the people are sore grieved. (3 Ed. I. c. 30.)

\* Froissart, chap. cxi.

† Sprigge's "Anglia Rediviva," 78, 79, 80.

How many wretched souls have we heard to say in the late troubles, What matter is it who gets the victory? We can pay but what they please to demand, and so much we pay now. (Hobbes' Dialogue concerning the Common Law, quoted in Southey's Common-Place Book.)

In the time of Louis XV., Rousseau found the peasants of Dauphiny living as barely as they could live, and trying to deceive the tax-gatherer by the appearance of extreme misery. It is difficult for remote settlers to act otherwise under a bad or a weak government, that does not secure property. Any display of wealth and comfort attracts the fiscal agent, or tempts the marauder, and a rich man must pretend to be as wretched as his neighbours. But there is small satisfaction in being rich if one must pretend to be poor; and the poverty which is simulated soon becomes real.\*

In a lawless age there can be no prosperous farmers. Handicraftsmen may associate, and may live in walled towns, but the farmer must dwell apart in the open country. The husbandmen of old times are never spoken of as a thriving class. Any trade was thought better than the farmer's. Chaucer carefully tells us that Osewold the Reeve was not a farmer:

"In youth he lerned had a good mistere,†  
He was a wel good wright, a carpentere."

The Plowman in the Canterbury Tales—who must be taken for a farmer, not an agricultural labourer—was nearly the humblest member of the cavalcade.

Although an ancient farmer's rent must have been no light burden, its amount cannot well be estimated, since the old rentals rarely state the value of the services, and they were the better part of the rent. The insurgents under Wat Tyler obtained a concession, afterwards revoked, that no acre of bondland should be subject to a higher rent than fourpence.‡ In 1279, the value of the services due from the tenant of a yardland at Girton, near Cambridge, was eleven

\* M. Daresté de la Chavanne, *Histoire des Classes Agricoles en France*, 238.

† Mystery est le craft ou occupation per que home gaine son living.—(Les Termes de la Ley.)

The hangman in "Measure for Measure" calls his occupation a mystery.

‡ . . . Et quod nulla acra terræ in comitatibus prædictis quæ in Bondagio vel Servizio tenetur, altius quam ad Quatuor denarios haberetur. . . . (7 Rymer, 317.)

or twelve shillings. At the same time the annual services of a smaller tenement were often worth a shilling an acre.\* A farm of twenty acres at Redgrave returned in silver twenty-pence—no more than a penny an acre; but it also returned a quarter and two bushels of oats—seldom worth less than thirty-pence; the tenant's ploughing cost him fivepence, his arriage and carriage twenty-one pence, harvest work sixpence, general week-work six shillings and eightpence: altogether thirteen shillings and sixpence. There was a further charge of two hens and ten eggs for the homestead, and a payment for pannage of hogs and pasturage of sheep and kine.† We must remember, moreover, that the tenement was subject to a heriot and other manorial charges—to the king's fifteenth, the parson's tithe, and other dues of the Church. When all these items have been added together, we shall find that the land had burdens upon it as long ago as the thirteenth century.

The Vision and Creed of Piers Plowman often dwell on the sufferings of the peasantry. The farmers were distressed in spring and summer, after they had exhausted their stocks. They lived upon onions, parsley, cabbage, and oatcake, until August, when they might hope to have corn in the croft. Then they had a few months of abundance, idleness, and improvidence. In winter they were pinched again, often wearing the same pilch by night and by day. In summer the poor could not get food enough, and they suffered in winter through the want of clothing.‡ The author of the Creed encounters a plowman toiling through the mire, clothed in rags, with worn-out shoes and mittens; his wife, with bare and bleeding feet, driving the lean oxen, and wearing little more than a winnowing-cloth over her shoulders; their

\* Tenet ix acras terre custumabilis et faciet per annum vii<sup>xx</sup> opera. . . et valent consuetudines ejusdem per annum ix<sup>s</sup>. (2 Hundred Rolls, 555.)

† Add. 14850, f. 73 b.

‡ Wo in wynter tymes for wantynge of clothes,  
And in somer tyme selde soupen to the fulle.

(Vision, 284; also 273.)

children cradled at the end of the furrow, hungry, cold, and clamorous. We cannot make room for the entire picture. Here is a little sketch, probably drawn in the fifteenth century, of a gaunt, rawboned figure, begrimed with toil and sweat, and every grinder plainly shown through its thin, hollow cheeks:—

“ The Plowman plucked up his plowe,  
When midsummer moon was comen in,  
And said his beasts should eat enow,  
And lie in grasse up to the chin.  
Thei ben feeble both oxe and cowe,  
Nought of them left but bone and skinne;  
He shook off share and coulter off drew,  
And hung his harness upon a pinne.  
“ He took his tabard and staffe eke,  
And on his head he set his hat,  
And said he would Saint Thomas seek,  
On pilgrimage he goeth full flat;  
In scrip he bare both bread and leeks,  
He was folswonke and all forswat:  
Men might have seen through both his cheeks,  
And every fang-tooth where it sat.”

*The Plowman's Prologue.\**

It is hard to understand so much misery, when we bear in mind that the poor people were not labourers, but farmers—expected to pay a considerable rent. It should be observed that the farms were reduced by under-settlement—that a man in the nominal occupation of thirty acres of land may have been, in truth, no more than a cottager. Perhaps, a bondman, who could not let his land without permission, lived more easily than an independent farmer.

Undersettlers, or subordinate tenants, are seldom expressly mentioned in the rentals. The three or four men who followed a customary tenant to the arable and autumnal preca-

\* We have modernised the stanzas a little. They are in some editions of Chaucer, but were evidently written after his time.

tions, must have been his undersettlers.\* These undersettlers usually returned to him a portion of the produce—the half or the third sheaf.† In addition to the lord's customary tenants he had, perhaps, some ordinary tenants on lease, who were in the position of our present tenantry. In the time of Edward I., the rent of a leasehold was commonly estimated at a fourth part of the very value of the land.‡

In almost every manor there were a few freehold tenants, rendering to the lord a quit rent, or slight agricultural services. They otherwise trained a falcon for the lord; returned a pair of spurs or of gloves, a pound of pepper or of cummin seed, a clove, a rose, a barbed arrow, or a needle.§ They were secured against arbitrary treatment by the writ called *Ne injuste vexes*; inferior tenants were not entitled to the protection of this writ.|| The undersettlers of freeholders are now and then noticed, as in the rolls of the half hundred of Ewelme, A.D. 1279.

There are very long lists of tenants in the rentals. When we consider that they do not usually comprehend undersettlers, and that to the several classes of tenants a crowd of landless men—the servants and retainers¶—ought to be added, we shall be inclined to conclude that the common estimates under-rate the ancient population—that England was pretty well peopled at the end of the thirteenth century.

\* Si aliquis eorum habeat undersetlam ad primam bedripam veniat.  
 . . . . . (Cust. Roff.) si famulas vel famula vel undersetles venerint.  
 (Add. 17450, f. 50.)

† The charge of a court baron. . . . Ye good men that bene sworne,  
 ye shal enquire and truely present . . . if there be any bondman, that  
 letteth his land, that is to say, for the halfe, or for the thirde shefe without  
 leaue. . . . (Tottyl's Law Tracts. The booke for a justice of peace,  
 etc. 83 b. 1574.) ‡ 6 Ed. I. c. 4. 13 Ed I. c. 21.

§ Galf'r' le Faukoner tenet de eodem domino ix acras cum messuagio et  
 reddit per annum vi paria de jez cum vorterell' et unam lessam ad leporarios.  
 (2 Hundred Rolls, 416.) Ricard' Grucet tenet unam hidam terre et solvit  
 predicto Johanni per annum i denarium et dimidiam libram piperis et unam  
 clavam gariophili et unum radicem gingiberi et unam garlend rose. . (341.)  
 Will' le megre tenet . . . unam acram in utroque campo pro una  
 acu per annum. (858.) || 5 Fleta, 40. F. N. B. 31.

¶ Neque prætereunda est illa pars populi (quæ Angliæ fere est peculiaris,  
 nec alibi, quod scio, in usu, nisi forte apud Polonos) famuli scilicet nobilium.  
 —(Bacon De Aug. Scient. viii. 3.)

ART. III.—ACCORD AND SATISFACTION.

IT is proposed to consider, in a very brief way, the objection which is raised to the introduction of the doctrine of Novation into the Common Law. If that objection rests upon any well-settled principle, it should by all means be sustained; but if, on the other hand, it has no rational foundation, it should not be permitted to obstruct the operation of so useful a doctrine.

Novation is a term of the Civil Law, and it was employed to denote the substitution of one contract in the place of another. A transaction of this kind was equally valid whether the original contract had been already executed as to one of the parties, or whether it still remained executory as to both. It is only in the latter event that the new is substituted for the old contract at the Common Law. The maxim of the Common Law is, that an accord without satisfaction is no bar to a suit upon the original obligation; and it is accordingly laid down, that an agreement to accept anything other than the original debt is not binding unless founded upon some new consideration. This, it will be observed, is not simply an application of the well-known principle of law which requires that each contract shall have a consideration, but it is an additional requirement that the consideration on both sides shall be *equal*.

If a substituted stood upon the same footing with an original contract, the debtor's promise to give something else would be a consideration for the relinquishment of the old debt, and its relinquishment would in turn be a consideration for the debtor's promise. And why may not a creditor relinquish a debt in consideration of the debtor's promise? Is it because a sum of money due is thought to be of greater value than the same amount of money in hand? Such seems to be the drift of the reasoning against such relinquishment; for it is advanced as an argument, that a creditor having performed his part of

the contract has a "perfect right" to the debt. ("Byles on Bills," Am. edition, 182, note by the distinguished American editor.) This is true; but it makes in favour of, instead of against, the validity of the new contract; it is a reason why the creditor *can* give the money due, but by no means why he *cannot*. One has a "perfect right" to money in his possession, but that was never heard of as an objection to his using it. A lawful way to use money is to give it in consideration for a contemporaneous promise. The relinquishment of a debt to which the creditor has a "perfect right," is equivalent to an advance of an equal amount of money. Why does not the law treat it, then, as a consideration for a present promise? It is said, in answer, that the creditor cannot be bound by a naked agreement to release a debt. But it is a mistake to consider the agreement naked, and here lies the fallacy of the argument. It has a consideration; to wit, the promise of the debtor to give something else. Such a promise is deemed sufficient to sustain an agreement to pay money *outright*; and, if so, it must, of necessity, be sufficient to sustain a promise to release a debt; for however "perfect" may be the "right" to the debt, possession is still necessary to make the ownership complete.

Thus it appears that substituted and original contracts stand in reason upon the same footing. How then is the distinction which the law makes between them to be accounted for? It probably arose from the following considerations.

Should the Courts examine into the consideration of contracts, they would be constrained by the principles of equity which guide their action, to require that the consideration on one side should be equal to that on the other. In order to enforce such a rule, it would be necessary to put a specific valuation upon each article that could become the subject-matter of a contract. But as the value of goods fluctuates according to the state of the market, this could not be done. The Courts, therefore, would be obliged either to pronounce all contracts void for want of equality of consideration, or to



assume to be the agent of both parties to re-adjust the terms of the contracts. It is to avoid either alternative that they refuse to inquire into the *sufficiency* of the consideration.

There is one exception to the refusal to inquire into the adequacy of the consideration; to wit, in contracts for the exchange of money. Here the value of the articles to be exchanged is fixed by law, and the Courts cannot refuse, but are bound to take judicial notice of the fact. They accordingly hold that, as money is the legal standard of value, contracts to exchange different amounts of money are not binding, because there is no consideration for the balance of, or difference between, the two amounts.

An agreement to give a different amount of money from that due, or even the same amount upon a different time (time being an additional legal consideration without a return) is not binding, because it lacks the equality of consideration which the law requires in exchanges of money; and without a legal sanction to give the agreement efficacy, it amounts to nothing; hence it cannot be a substitute for, or satisfaction of, the debt. As agreements of this kind make up the bulk of substituted contracts, which are, for the most part, agreements either for a reduction in the amount of the debt, or for an extension of credit, it was inferred, though erroneously, that *all* substituted contracts are likewise not binding. It was not observed that where something other than money is offered in consideration for the money which is due, the transaction stands upon the same footing with other bargains; in such case, as in ordinary barter, the debtor agrees to give one thing in return for another. "And where," said Baron Parke, in *Cooper v. Parker* (15 C. B., 822), "the matter pleaded in satisfaction of a liquidated demand is of uncertain value, the Court will not set a value upon it, or inquire into the sufficiency of the consideration." In consequence of this oversight in not discriminating between the two classes of contract,—that is, between contracts for the exchange of money, and contracts not for the exchange of money,—the ambiguous maxim, that an

accord without satisfaction is no bar, was devised in order to prohibit all substituted contracts. That maxim *says*, that an agreement is not satisfaction of a debt; it *means*, that a void agreement, which is not an agreement, is not satisfaction of a debt. The question always is, whether the agreement is binding; that is, whether it amounts to a legal agreement. It is only when it wants some essential of a valid agreement, like *e. g.* a consideration, that it is said not to be satisfaction of a debt. Where there is no doubt about the consideration, as in case of a fresh consideration, the agreement is invariably held to be satisfaction, if such was the intention of the parties.

It is easy to see how the maxim, that an accord without satisfaction is no bar, originated. It is an undue extension of the familiar rule, that an agreement to do what the party is already bound to do is not binding. Thus, in trespass for taking the plaintiff's cattle, it was held not to be a good plea to say, that there was an accord that the plaintiff should have his cattle again; that not being satisfaction, unless accompanied by delivery of the cattle. (1 *Bac. Abr.* 22.) Accordingly, where the new agreement is merely to do what the party is already bound to do, it is strictly true that the additional agreement is not satisfaction unless executed. The new agreement is not binding because it wants a consideration, and, therefore, having no legal existence, it could not be satisfaction of the demand.

It is contended that the law must protect the creditor's rights, which would be impaired if the debtor could escape from the terms of one contract by making another. But the answer to this is, that the new contract, like any ordinary contract, requires the consent of both parties; and if the creditor cannot take care of his interest in making it, the reason must be that he is incapable of making any bargain. The argument proves too much; it would prevent all contracts. Instead of an injury, however, the new contract works a benefit to the creditor, as well as to the debtor. Take, for the sake of illustration, the following case:—A contractor, who is unable

to raise money, is indebted to a person who is about to have a house built. Why should not the creditor be allowed to relinquish his debt, in consideration of his debtor's agreeing to build him a house of which he stands in need? In this way the debtor would be enabled to pay his debt, which otherwise he could not do, and a creditor to save himself the expenditure of an equal amount of money. Thus it is often the only, as well as the best mode in which a creditor is able to collect his debts.

It is evident that the maxim is not now looked upon by the Courts with favour. Thus Baron Parke, following Mr. Justice Byles in his Treatise on Bills, p. 153, decided in *Foster v. Dawber* (6 Exch., 839), that the rule does not apply to commercial paper; which he held to be governed by the law merchant, and to follow, in this respect, the civil law and the continental law of Europe. By this decision, contracts for the exchange of money, which mainly take the form of promissory notes and bills of exchange, and to which alone, as has been shown, the reason of this rule applies, are withdrawn from its application. This decision looks like the precursor of the total overthrow of the maxim; for it is inconceivable that the same Court will continue, for any length of time, to hold an agreement to accept a part of a sum of money in discharge of the whole to be satisfaction, if put in the form of a promissory note or bill of exchange, but not if put in any other form of a contract, even though it be followed by actual payment or execution.

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ART. IV.—MAY'S CONSTITUTIONAL HISTORY  
OF ENGLAND.

*The Constitutional History of England since the Accession of George the Third, 1760—1860.* By Thomas Erskine May, C.B. In Two Volumes. Vol. II. London, 1863.

ALTHOUGH protests of the strongest nature have been entered against the introduction of the principle of the division of labour into history, the practice, we fear, has become so inveterate, and the advantages which attend it, under existing circumstances, are so unquestionable, that it seems best to submit to it with as good a grace as possible. Indeed, considering the fulness of research and minuteness of inquiry which the character of the present age renders necessary in all historical compositions of a more ambitious order, we see no likelihood of any work which shall be the History of England being produced in our day, or even in that of our immediate descendants. Not only with respect to those periods of history of which most has been written does much remain in obscurity—many incidents and circumstances being inadequately known, and the relations of many events to each other imperfectly understood—but much, also, remains to be done with respect to those earlier periods which used scarcely to be considered as coming within the domain of history, while antiquarian research and the science of languages have shed light, obscure but startling, even on confessedly pre-historic times. Bearing, as this latter inquiry does, on the origin and migration of races, it is impossible to dismiss it as irrelevant, when we have to deal with the history of a composite people such as that which inhabits these islands; and, at all events, until it has been pursued further than it has hitherto been, it will be impossible to pronounce how much or how little it may affect what is known as the History of England. But even

without stretching the province of history beyond its received boundaries, it is quite clear that the different divisions and branches of our history must be pursued separately for a long time to come, and that it will only be after much labour has been undergone in each department, and with reference to each period, that the materials of a work such as all must desire will be fully prepared. Then only, if even then, will it be possible for some transcendent genius to bind the various sections in one *fasciculus*, and to present to the world a History of England which shall indeed be "a possession for ever."

Meanwhile, whatever industry may be bestowed on special subjects connected with our history, there are approximations to such a result. No one now thinks of writing the political history of any period without reference to its religious, intellectual, and social condition. The ecclesiastical historian no longer ventures to shut his eyes to those mundane influences, which modify so powerfully, though often unconsciously, all the opinions and all the practices of men. The days have gone by when it was possible for an author to write the life of Bacon the Lord Chancellor, while ignoring Bacon the philosopher.

Constitutional history, especially that of England, throws its branches out widely, and covers a large portion of the field of general history. It connects itself with the revolutions of race, of thought, and of manners, as well as with those of government. Each step in the progress of our constitution is marked by great changes in society, both precedent and subsequent, nearer or more remote. The battle-field, the council board, the debates of parliament, the judgments of courts of law, the pulpit, the press, the coffee-house, and the club, afford materials for the records of the constitutional historian of England. A mere statement of the law, as it was gradually developed, however accurate and comprehensive, would most inadequately represent the real history of our constitution. It is but a small portion of the constitution of this country which is to be gathered from Acts of Parliament and the Reports—

from our statute and common law. Its predominating principles are to be found in those sentiments which are engraved deep on the hearts of Englishmen, and which the events of a long and eventful history have contributed to form.

It is obvious, from these considerations, that no department of English history possesses a higher importance or deeper interest than that which is termed constitutional history. No names call forth a prouder feeling in the breasts of Englishmen than those which belong to it; no events have so powerfully affected all our habits and feelings as those which it records. Hallam's great work, it must be admitted, has never been popular, but this arises not from the subject, but from his mode of treating it. No man was better fitted, in many respects, to undertake such a subject. His comprehensive and inquiring mind, his clear perception of the real point of every question, and his admirable skill in weighing opposing views, and striking a balance between conflicting parties, were rare qualifications for such a task. But these qualities in him, from not being properly tempered by others no less important, were apt to assume the appearance of rigidity and severity. He would not admit into history the principle of set-off, without which, we humbly think, justice can never be done either to individuals or to parties. His iconoclasm was too unsparing—not merely viewed with reference to popular feeling, but on a fair philosophical estimate.

We have no intention of comparing Mr. May as a constitutional historian with Hallam; but in some respects, unquestionably, he has the advantage of the latter, and we shall certainly be surprised if his work does not enjoy a larger amount of popularity than that of which it is the supplement. While perfectly fair and impartial in his statements and estimates, and while arriving at his conclusion with sufficient deliberation, he yet pronounces with firm decision in favour of liberty and progress, and of those by whom they were supported during the period which his work embraces. His views are not extreme, but they are unmistakable; they are

unwavering, and, we venture to think, they are unassailable. They are the views which commend themselves to every man who studies the history of this country, from the commencement of the reign of George III. to the present time, without prejudice or partiality. They are the views which our present experience shows to be sound and wise; and they are the views which we are persuaded will be ratified by the judgment of posterity.

In a recent number of this Journal,\* we introduced to the notice of our readers the first volume of Mr. May's work, and we then expressed our high opinion of the manner in which he had accomplished that portion of his task. In the volume to which we refer he had treated of the influence and revenues of the Crown, the House of Lords, the House of Commons, and the relations of parliament to the crown, the law, and the people. In the present volume, which completes the work, he discusses party, the press and liberty of opinion, the liberty of the subject, the church and religious liberty, local government, Ireland before the Union, British colonies and dependencies, and the progress of general legislation. It is obvious enough, from the above enumeration, that the author has omitted nothing which could fairly be considered as directly connected with the subject of which he treats, while under each head will be found the utmost fulness of detail, without the slightest tendency to prolixity. No undue prominence is given to subjects which are of inferior interest, and no question of essential importance has been lightly passed over. The work is obviously the production not merely of a well informed and painstaking author, but of a man of sound and practical judgment; of one who has not only a thorough knowledge of the history of the period which he discusses, but an intimate acquaintance with the present state of public opinion, and with the relations of existing statesmen and parties. If Gibbon owed part of his success, as the historian of the Decline

\* November, 1861.

and Fall of the Roman Empire, to the observations which he had made as a member of the House of Commons, we cannot doubt that Mr. May's official position has been of incalculable advantage to him, in treating a subject which, in all its branches, is more or less directly connected with the House of which he is so important and so efficient an officer.

The subjects which occupy the present volume possess, in some respects, even a higher interest than those to which the former was devoted, because they touch more directly the happiness and prosperity of the community at large, and the practical working of the constitutional system under which we live. The limits of the prerogative, the law relating to impeachment, and the right of stopping the supplies, are fortunately at the present day subjects of little more than theoretical interest; but the freedom of the press, religious liberty, and the progress of general legislature, are matters with which we have all more or less to do, and of which the present state cannot be separated from the past history. Even with respect to party, modified and subdued as that great institution now is, it cannot be said that it belongs to a former state of things, and has been finally disposed of. Much as party has been abused by unscrupulous men, and much as its evils have been deplored by wise and good men, its existence forms one of the necessary conditions of sound constitutional government. In its general results on the progress of the constitution there is no serious ground for complaint, unless on the supposition, that without party men would all have been enlightened, patriotic, and disinterested. But taking men as they are, the best prospect of sound government arises, when no principle can be pushed to an extreme; when the views on one side are counteracted by those on the other; when the party in power is confronted in all its movements by the party seeking for power; when her Majesty's Ministers must answer for their policy and conduct, before parliament and the country, to her Majesty's Opposition.

"The annals of party," says Mr. May, with much truth,



“embrace a large portion of the history of England,” and he refers in a note to Mr. Wingrove Cooke’s “History of Party,” to which he acknowledges many obligations, as relating “the most instructive incidents of general history.” Of course he considers the subject under a more limited aspect than is done in the able and interesting work of Mr. Cooke, and confines himself chiefly to the influence of party “in advancing or retarding the progress of constitutional liberty and enlightened legislature.” His general view on the subject may be gathered from the following statement of the principles represented by English parties :

“The parties in which Englishmen have associated have represented cardinal principles of government—authority on the one side, popular rights and privileges on the other. The former principle, pressed to extremes, would tend to absolutism—the latter, to a republic ; but, controlled within proper limits, they are both necessary for the safe working of a balanced constitution. When parties have lost sight of these principles, in pursuit of objects less worthy, they have degenerated into factions.”—Vol. II. p. 2.

Several circumstances led to the revival of the Tory party on the accession of George III. ; and their alliance with the king’s friends at once placed them in a position of advantage over the Whigs—a position from which they were never permanently dislodged for the long period of seventy years. In addition to that respect for authority which had always characterised the party, they now adopted a principle not hitherto recognised by any set of Englishmen—a determined and indiscriminating opposition to change of any kind in our laws. A few amendments had been wrung from them by the opposition, backed by the rising influence of public opinion ; but, in the main, the laws of England, as expounded by Blackstone, were the laws of England as they existed towards the latter years of the reign of George IV. But the new commercial policy inaugurated by Huskisson, the partial mitigation of the penal code, the repeal of the Test and Corporation Acts, and the passing of the Catholic Relief Act, had, before the accession of William

IV., shown that the old Tory creed could no longer be kept whole. After Parliamentary Reform had been carried, the Tories wisely discarded their ancient dogma, and professed themselves willing to amend the institutions of the country. Much of this altered state of feeling was due to the great change in public opinion, which had been gradually brought about by increasing intelligence—much to the impossibility of maintaining, under altered circumstances, their old position; but much also was due to the wise and liberal views of the late Sir Robert Peel. Great as a minister, he was, we think, still greater as a leader of opposition. While the Whigs during the first two years after the Reform Act were forwarding, what Mr. May justly calls “the noblest legislative measures which have ever done honour to the British Parliament,” abolishing slavery, throwing open the commerce of the East, reforming the church in Ireland, averting the social peril of the Poor Laws, Sir Robert Peel maintained the cause of the opposition with the dignity of an English statesman. He frankly stated that he “considered the Reform Bill a final and irrevocable settlement of a great constitutional question—a settlement which no friend to the peace and welfare of this country would attempt to disturb, either by direct or indirect means.” Avowing this principle, and professing to desire the improvement, but not the destruction, of our institutions, he gradually acquired an extensive influence throughout the country. A large proportion of the intelligence and respectability of the nation had been in favour of the Reform Bill, and of the ministry by which that measure was introduced and carried. Even many who had wished a less extensive change, but who saw that some change was necessary, had not been unfriendly to that great political experiment. The Whig party seemed to have gained a supremacy from which they would not be cast down, until a cycle of many years had brought round a revolution in public opinion and in all the relations of the State. The proposal to apply the surplus revenues of the Irish church to secular purposes, the breaking-up of the Grey

cabinet, the weakness of the Melbourne ministry, and their supposed compact with the O'Connell party, joined to the great ability and prudence displayed by Sir Robert Peel, supported as he was by Mr. Stanley and Sir James Graham, loosened the hold of the Whigs on the country. Although several measures of importance were carried, the Melbourne ministry gradually lost influence ; and, at last, the accession of Sir Robert Peel to power, introduced a new series of reforms which have been continued by the legislature down to the present time, and which have operated most beneficially on the material interests of the community.

How far Sir Robert Peel was justified, as a party leader, in proposing the Repeal of the Corn Laws is a question entirely apart from the merits of the measure itself. Mr. May is of opinion that he was guilty of political disloyalty, and that his conduct was opposed to all the principles of party ethics :

"As a statesman," he says, "Sir Robert Peel was entitled to the gratitude of his country. No other man could then have passed this vital measure, for which he sacrificed the confidence of followers and the attachment of friends ; but, as the leader of a party, he was unfaithful and disloyal. The events of 1829 were repeated in 1846. The parallel between 'Protestantism' and 'Protection' was complete. A second time he yielded to political necessity and a sense of paramount duty to the State, and found himself committed to a measure which he had gained the confidence of his party by opposing. Again was he constrained to rely upon political opponents to support him against his own friends. He passed this last measure of his political life amid the reproaches and execrations of his party. He had assigned the credit of the Catholic Relief Act to Mr. Canning, whom he had constantly opposed ; and he acknowledged that the credit of this measure was due to 'the unadorned eloquence of Richard Cobden,' the apostle of Free-trade, whom he had hitherto scouted. As he had braved the hostility of his friends for the public good, the people applauded his courage and self-sacrifice, felt for him as he writhed under the scourging of his merciless foes and pitied him when he fell buried under the ruins of the great political fabric which his own genius had reconstructed, and his own

hands had twice destroyed. But every one was aware that so long as party ties and obligations should continue to form an essential part of parliamentary government, the first statesman of the age had forfeited all future claim to govern."—Vol. II. pp. 72, 73.

The portion of the present volume devoted to the Press and Liberty of Opinion may be summed up in the words with which the author opens the subject :—

"We now approach the greatest of all our liberties—liberty of opinion. We have to investigate the development of political discussion ; to follow its contests with power ; to observe it repressed and discouraged, but gradually prevailing over laws and rulers, until the enlightened judgment of a free people has become the law by which the State is governed."—Vol. II. p. 95.

The greatest gain to constitutional liberty which was obtained during the reign of George III., was unquestionably the establishment of the freedom of the press. How far the doctrine laid down by Lord Mansfield, viz., that it was the province of the court only to judge of the criminality of a libel, was sound in point of law, we shall not now take upon us to determine. But questionable as it might be on principle, it had certainly some authority in its favour, and was enforced, as Mr. May says, "with startling clearness by his lordship." To no man does the liberty of the press owe more than to Erskine, who boldly combated this view in his admirable argument in the Dean of St. Asaph's case, by which, as well as by his speech on the trial, public opinion was powerfully influenced. So strong was the impression produced, that on the first introduction in the House of Commons of Mr. Fox's Libel Bill, which was in the form of a declaratory law, there was not a dissentient voice, although when it finally passed the Upper House, Lord Thurlow and five other lords signed a protest, predicting "the confusion and destruction of the law of England." It was certainly destined to be "the confusion and destruction" of arbitrary prosecutions for libel—not, indeed, at once, for these continued for many years afterwards;

but ultimately, as intelligent and liberal views spread through the community, it produced this result with signal effect, so that any government which should now attempt to restrain the liberty of the press by such means, would at once forfeit the confidence of the nation.

One unquestionable result of the liberty of the press has been to elevate the press itself. Higher intellects have been attracted to its service; and presenting, as it has long done, to the public rapid and full information on all events, both at home and abroad, and able comments on all the topics of the day, mere virulent invectives on public men are now considered as simply absurd, and produce, if by any accident they occasionally appear, no dangerous effects whatever. Even those slanderous attacks on private individuals which were once the disgrace of the press, are now almost unknown. Private persons are seldom brought before the public by the press, unless they intrude themselves on the world by their own actions, speeches, or writings; and the great question is always whether the comments are fair and honest as they purport to be. Addressing intelligent readers, and supplying important materials for thought and reflection, the conductors of the press would now feel it to be mere impertinence, unless under some imperative obligation of public duty, to drag individuals from the privacy of domestic life and hold them up to general censure or ridicule. Journalism has now become a profession, to secure success in which the possession of a copious vocabulary of scurrilous language, and of a large amount of bitter feeling, is of little avail.\*

Mr. May has treated the subject of the press in connexion

\* The estimation in which the press was held in the early part of the present century in certain quarters may be gathered from the following circumstance, mentioned by Lord Colchester (*Diary* II. 240), and quoted by Mr. May:—"In 1808, the benchers of Lincoln's Inn passed a by-law, excluding all persons who had written for hire, in the daily papers, from being called to the bar. The other Inns of Court refused to accede to such a proposition. On the 23rd March, 1809, Mr. Sheridan presented a petition complaining of this by-law, which was generally condemned in debate, and it was soon afterwards rescinded by the Benchers."

with the liberty of opinion. Public meetings, political associations, and "agitation," early in the reign of George III., began to exercise an influence over government and the legislature more powerful than even that of the press. It was in connexion with Wilkes's election for Middlesex, in 1768, that public meetings first took their place among the institutions of the country. In no less than seventeen counties the freeholders met in support of the electors of Middlesex, whose rights had been violated by the Commons. But the meetings which were held ten years later for the purpose of discussing economical and parliamentary reform were still more formidable. The freeholders of Yorkshire and twenty-three other counties, and the inhabitants of many cities were assembled by the sheriffs and chief magistrates; and at these gatherings all the leading men of each neighbourhood were present. A great meeting was held in Westminster Hall, at which Mr. Fox presided, and was attended by many of the most distinguished members of the opposition. These assemblages were the results of concerted movements throughout the country; and committees of correspondence were appointed by the several counties, who kept alive the agitation. Other political clubs and societies were established, which kept before the public the different causes for the promotion of which they were formed, by meetings, deputations, resolutions, petitions, and publications. Such was the beginning of a system which was destined to produce the most powerful influence in advancing political reform and good government. Still more powerful is the influence they have had in forming the political habits of Englishmen, by making public discussion the great instrument of propagating opinions, and exciting the attention of the legislature.

In the chapter on the Liberty of the Subject, a very clear and succinct account is given of the proceedings against Wilkes, and the printers of No. 45 of the *North Briton*, which involved the great question of the legality of general warrants. When the bill of exceptions, which was tendered in Leach's

case, came on to be argued in the Court of Queen's Bench, precedents were cited showing the practice of the Secretary of State's office ever since the Revolution; but Lord Mansfield pronounced the warrant illegal, saying, "It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and give certain directions to the officer." The other three judges concurred, believing that "no degree of antiquity can give sanction to a usage bad in itself." (3 Burr. 1742.) In the action brought by Entick, a writer in the *Monitor, or British Freeholder*, for seizing his books and papers under a general search warrant, the same question arose. The warrant specified the name of the person against whom it was directed, but gave a general authority to the messengers to take all his books and papers, without specifying what particular papers were to be seized. On a special verdict, the Court of Common Pleas held the warrant to be illegal, although it was found by the special verdict that many such warrants had been issued since the Revolution. Lord Camden considered that the practice had arisen in the Star Chamber, and that, having been revived and authorised by the Licensing Act of Charles II., in the person of the Secretary of State, it had been continued after the expiration of that Act. (*Entick v. Carrington*, 19 St. Tr. 1030.) Lord Mansfield and the Court of King's Bench shared in this conjecture. (*Leach v. Money*, 3 Burr. 1692, 1767.) Lord Camden, it may be mentioned, doubted the right of the Secretary of State to commit at all, except for high treason; but the Court, from deference to prior decisions, felt bound to acknowledge the right.

From the Revolution to the rebellion of 1745, the Habeas Corpus Act had been frequently suspended. But although, during the American war, the king had been empowered to secure persons suspected of high treason committed in North America, or on the high seas, or of the crime of piracy, no attempt had been made to suspend the civil liberties of Englishmen at home, for nearly fifty years after the invasion

of the realm by Charles Edward. In 1794, however, Mr. Pitt moved for a bill to empower his Majesty to secure and detain persons suspected of conspiring against his person and government, justifying the measure on the ground, that whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the constitution and society were threatened. Fox, Grey, and Sheridan, strongly opposed the bill, and denied that any such dangers threatened the State as would justify the surrender of the chief safeguard of personal freedom. The measure, however, passed, and was continued till the end of 1801.

"Though termed," says Mr. May, "a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Charta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath, and entitled to a speedy trial, and the judgment of his peers. But any subject could now be arrested on suspicion of guilt; his accusers were unknown, and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to Secretaries of State, shrank from the witness-box, and their victims rotted in gaol. Whatever the judgment, temper, and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused. Whatever the danger by which it was justified, never did the subject so much need the protection of the laws, as when government and society were filled with suspicion and alarm."—Vol. II. pp. 265-6.

Great discussion took place before the Act had expired, on the bill to indemnify all persons who, since the 1st February, 1793, had acted in the apprehension of persons suspected of high treason. The bill was strongly opposed, but was justified on the ground that it would be impossible for persons accused of abuses to defend themselves, without disclosing secrets dangerous to the lives of individuals and to the State. There is, no doubt, much force in this justification of the bill of indemnity, though we cannot but agree with Mr. May, that



"it were better to withhold such powers, than to scrutinize their exercise too curiously;" and that, "were any argument needed against the suspension of the law, it would be found in the reasons urged for indemnity." After the suspension of the Habeas Corpus Act, in 1817, a similar bill of indemnity was brought forward by ministers, and passed after strenuous opposition. The discussions, however, which arose, disclosed the great evils arising from suspending fundamental laws; and since then the Habeas Corpus Act has not been interfered with in England.

In the chapters on the Church and Religious Liberty we have a full account of all those memorable struggles so long maintained by the church against the claims of Dissenters and Roman Catholics to political equality. The granting of these claims and the reform of abuses within the church herself, have removed the grounds of much jealousy and ill-will; her position as a National Church has been by no means compromised by such concessions; and if her clergy are only willing, as to a great extent they are, to keep pace with the advancing enlightenment of the age, she has the opportunity of enjoying a much wider popularity, and doing a much larger amount of good than at any former period of her history. . But one essential condition of her permanence and success as a National Church at the present day is, that she should retain and still further increase her power of comprehending men of various opinions and modes of thought.

"The fold of the church," says Mr. May, "has been found wide enough to embrace many diversities of doctrine and ceremony. The convictions, doubts, and predelictions of the 16th century still prevail, with many of later growth; but enlightened Churchmen, without absolute identity of opinion, have been proud to acknowledge the same religious communion—just as citizens, divided into political parties, are yet loyal and patriotic members of the State. And if the founders of the reformed church erred in prescribing too straight a uniformity, the wisest of her rulers, in an age of active thought and free discussion, have generally shown a liberal and

cautious spirit in dealing with theological controversies. The ecclesiastical courts have also given breadth to her Articles and Liturgy. Never was comprehension more politic. The time has come when any serious schism might bring ruin on the church."—Vol. II. p. 445.

The remaining part of the volume is devoted to a variety of subjects of much interest. In that which treats of the progress of general legislation, and which concludes the work, will be found a reference to the various measures of legal and financial reform, and others bearing on the social welfare of the community, which have been adopted in recent times. The observations of the author are very just and valuable, but the extent and variety of the subjects prevent him doing more than merely touching upon them. With respect to one important topic alluded to, viz., the improved spirit and temper of the judges, Mr. May has truly stated that the measure, passed at the suggestion of George III., which provided that the commissions of the judges should not expire with the demise of the crown, although entitled to approval and respect, did not prevent them being leagued closely with the crown.

"But no sooner had principles of freedom and responsible government gained ascendancy, than judges were animated by independence and liberality. Henceforward they administered justice in the spirit of Lord Camden, and promoted the amendment of the laws with the enlightenment of statesmen."—Vol. II. p. 595.

We have already stated the high estimate we have formed of Mr. May's work, and we desire again to express, before concluding, our sense of the full and accurate information which it conveys, of the sound and judicious views which are put forward, and of the admirable spirit in which the whole is conceived and executed. In our notice of the former volume, we stated our approval of the plan adopted by the author of deviating from the chronological narrative, and treating the subject under certain leading heads. We still adhere to the

view then expressed ; but, in reading the second volume, we confess we have occasionally experienced doubts as to whether this method has not somewhat impaired the interest of the book on continuous perusal, and we have heard similar feelings expressed by others. But be that as it may, there can be no doubt that the plan adopted is by far the most convenient for purposes of reference. Thus, the whole information connected with the revenues of the crown, the civil list, and pensions, is to be found under one chapter, and the different cases of suspension of the Habeas Corpus Act are brought together in the chapter on the Liberty of the Subject. We give these only as instances, for the same advantage arises from the mode in which all the various topics which fall within the purview of the work are treated. Not only is much inconvenience avoided by this method, but each particular subject is more fully presented and more thoroughly discussed than would be possible, without much prolixity and repetition, in a chronological narrative.

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#### ART. V.—ADMINISTRATION TO FOREIGNERS DYING IN ENGLAND.

A VALUABLE suggestion has recently been made by the Judge of the Court of Probate, upon the subject of the *hereditates jacentes* of foreigners dying in England without relatives near them, in cases where the 24 & 25 Vict. c. 121, § 4, does not apply.

In a country like ours, to which the stranger resorts not for pleasure but for profit, not to spend but to make money, it must frequently happen that when he dies here he dies with more or less of property in his actual possession.

At most times, also, this foreigner dies indebted to some persons in England, and at all times he requires burial. As

for his property, it often happens that, such as it is, it is in a form which makes it liable either to depredation or waste. It may consist of commercial securities, which exact early realization, or it may be cash and personal effects, which lie at the mercy of a dishonest landlord.

Under such circumstances as these the following consequences will constantly occur : the estate is lost, wasted, or stolen, and the British creditor and foreign heir are alike defrauded. But these consequences are as contrary to that comity which a nation should show nations, its friends, as they are opposed to that care of its own subjects which is the aim of all political government.

We have intimated that our system of law has not provided a remedy for this state of evil ; and it is so, though at the same time it is true that occasionally and spasmodically something has been done or attempted in practice to arrest these mischiefs.

The case of *Gudolle, deceased*, decided long since by Sir John Nicholl, and reported in Mr. Coote's Common Form Practice of the Court of Probate, will give us the best idea of what the old Prerogative Court thought itself able to do in these cases. There a foreigner had died in this country, away from his relatives, possessed of certain bills of exchange upon English merchants. Sir John Nicholl, under the pressure of the circumstances, granted administration to an English friend or acquaintance of the deceased, who had procured the bills to be accepted, and had paid certain necessary expenses of the deceased, " limited to the sums due and to become due upon the bills of exchange, and after the administrator should have reimbursed himself the money which he had expended on behalf of the deceased, and also the expenses of the application to the Court, to invest the balance in his own name in Government securities, and to keep it invested until a general representation should be effected to the deceased."

There are great and obvious defects in such a grant of administration as this. In the first place, there is the primary

defect of granting administration to a mere private person, without choice or discrimination, because he has the earliest information, and is the first to apply for it. In the second place, the mistake is committed of giving to the applicant's debt or claim, whatever it be, a preference that the law does not necessarily accord to it.

It is impossible for the Court, under such circumstances, to know whether it grants to an honest man or a trickster. It takes the applicant at his own word, and upon his own showing, and it has no alternative between acquiescence and refusal. If it comply with his prayer, it may make the very serious mistake of sacrificing the interests of foreign heirs beyond all hope of remedy. If it withhold its consent, and refuse to grant administration, it may totally sacrifice the interests of both the heir and the honest creditor, by exposing *bona peritura* to certain loss.

This is the dilemma which the judicial mind of the present Judge of the Probate Court has lately noted; and for this double and inevitable evil he has proposed a remedy as easy as it is sufficient. The suggestion was made by him in the course of last Michaelmas term, in the case of one *Wyckoff*, deceased.

In this case an American belonging to one of the Confederate States had died on board an English vessel, during his passage to this country. He had in his possession certain bills of exchange, payable to his order here. He had no relatives in this country, and all communication between his family and England was stopped by Mr. Lincoln's blockade.

In hearing an application from a person whose interest was much the same as that of the grantee in *Gudolle's* case, Sir Cresswell Cresswell had, on the first occasion, thrown out a suggestion that the Queen's proctor should take administration to this foreigner. This offer had been declined, though it does not appear why, and Sir Cresswell Cresswell afterwards, in giving judgment, expressed his embarrassment at the refusal, and observed, by way of comment upon it, "In all

cases of this sort it is better that there should be some public officer. We might have a scramble between different individuals; some might get one part of the property and others another part of it, and they might all say, 'Make me the administrator,' whereas here is the Queen's proctor a responsible party."

This, like other suggestions of Sir Cresswell Cresswell, displays the acumen and judgment which are the characteristics of that eminent judge, and we regret that the coyness of the Crown officer should have thrown impediments in the way of establishing a new and legitimate practice; but we trust that when another case of the like nature shall occur, the modesty of the Crown officer will have disappeared, and that he will yield to the recommendation of the judge, and consent to do a public service, even though it be accompanied by private emolument.

In regard to the suggested practice, there is, as we have intimated, very much to be said *à priori* in its favour, but this mode of demonstration is wholly unnecessary, for it has already had, during a long flux of time, the confirmatory support of experience upon a large scale in another part of the British dominions. In the Presidencies of India a similar practice has been established for the period of a century. In each Presidency there is found an Administrator-General, whose duties are to collect and secure the *hereditates jacentes* of Englishmen and others who die in India.

The old law upon this subject underwent a revision a few years ago, and the existing regulations are to be found in the Act No. 8, of 1855. As this statute is little known in this country, we will extract such of its provisions as are generally applicable to the matters we have been discussing.

By the first section of this Act, an Administrator-General is appointed to each of the three Presidencies.

By the seventh section, every such Administrator is required to give security for the due execution of his office in the amount of two lakhs of Rupees.

By the eighth section, he is released from having to enter into administration bonds.

The ninth section enacts, that any letters of administration or letters *ad colligenda bona*, which shall be granted by the Supreme Court of Judicature at any of the Presidencies, shall be granted to the Administrator-General, unless they shall be granted to the next of kin of the deceased, and declares that the Administrator-General of the Presidencies shall be deemed to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor or friend of the deceased.

The eleventh section provides, that if any person, not being a Mahomedan or Hindoo, shall have died, and shall, if a British subject, have left assets exceeding the value of five hundred Rupees within any of the Presidencies, or any of the provinces or places subject thereto, or shall, if not a British subject, have left personal assets exceeding five hundred Rupees within the local limits of the jurisdiction of the Supreme Court at any of the Presidencies, and no person shall, within a month after his death, have applied for probate of a will, or for any letters of administration of his estate, the Administrator-General of the Presidency is required to take administration of the effects of such person.

The twelfth and fourteenth sections empower the Supreme Court to grant administration to the Administrator-General in all cases where the deceased's assets are in danger of misappropriation or waste.

These regulations form a *jus et norma* for ourselves also, if the necessity for the introduction of such a practice be equally demonstrable. This necessity, however, is just as cogent where the like circumstances exist, whether they occur occasionally only, as in this country, or constantly, as in India. In the interest of society, here equally as in India, care should be taken to preserve the helpless estate of a deceased, whenever circumstances tend to its jeopardy or destruction, and the propriety and justice of an early discharge of pressing claims

upon it, is in the same interest equally undeniable, while as regards the property of foreigners, the feeling of the *comitas gentium* should impel our Courts to adopt some such system for its protection as exists in most other countries of Europe.

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#### ART. VI.—FRIEDRICH CARL VON SAVIGNY.

IT is time that some special notice should be taken of one whose name is so widely known, and whose influence even in this country is so important, but as to whose character and history nothing has yet been laid before the English public. We propose, without attempting at present a full examination or criticism of his works, to give such an account of Savigny and of his opinions as our materials will permit.

Friedrich Carl von Savigny was descended from a family which took its name from the Castle of Savigny, near Charmes, in the valley of the Moselle. The Sieurs de Savigny are often named in the ancient records of Lorraine, and even in the Chronicles of the Crusaders, Andrew de Savigny (wrongly written Chavegni, Chavigny, &c.) having fought by the side of Richard of England against Saladin. When the Duchy of Lorraine began to break up, at the time of the Thirty Years' War, the family of Savigny adhered to Germany along with the reigning house, and thus escaped the annexation to France, which the gradual decomposition of the State slowly but surely brought about. In 1630, Paul von Savigny became attached to the princely house of Leiningen-Westerburg, served in the armies of France and Sweden, then the defenders of German Protestantism, acquired property at Calestadt, on German soil, and was buried in 1685 at Kirchheim, in Alt-Leiningen. In France the family was now regarded as extinct. Savigny's great-grandfather, the son of this Paul,



was in the service of the Prince of Nassau, and became President at Weilburg. He appears to have been a strenuous defender of the honour and integrity of Germany, and in a work entitled "*La Dissolution de la Réunion*," wrote vehemently against the ambition and tyranny of Louis XIV. His son, Savigny's grandfather, was the last soldier of the family, having served in the Imperial armies in Italy, in the Seven Years' War, and been present at the siege of Turin, by Rehlinger. He afterwards devoted himself to political life, held administrative offices in various small States, and died Cabinet Minister of Deux-ponts. He increased the German possessions of his family. His son held similar situations under various princely houses, and is said to have been a man of great personal worth and authority. He became a noble of the Empire, and was the envoy (*Kreisgesandter*) of several princes to the Diet of the Circle of the Upper Rhine, which latterly met at Frankfort-on-the-Maine. Here, on 21st February, 1779, was born the great jurist. He was indebted for much of the moral and religious earnestness of his nature to the early training of his mother, who taught him the French language, and took him to the French religious services held at Boekenheim, beyond the territory of Frankfort.

In 1791 and 1792, Savigny lost his parents, and was left, at the age of thirteen, the sole remaining scion of his family, but with a good fortune. His guardian, Herr von Neurath, Assessor of the Imperial Chamber (*Reichskammergericht*),\* at Wetzlar, took his ward into his house, and brought him up with his own son. From him the youths began, at the age of fifteen, to receive instructions in law. The worthy magistrate traced the subsequent fame of his illustrious pupil to his own teaching—an amiable hallucination which Savigny's grateful piety never allowed him to disturb. Herr von Neurath was really a learned man in the juris-

\* This was the Supreme Court for all Germany, having concurrent jurisdiction with the Imperial Council at Vienna.

prudence of the eighteenth century, being especially famous as a thorough proficient in the German *Staatsrecht* of the time.

"But," says Professor Rudorff, "in these volumes, compiled in the axiomatic and mathematical method, cut up into questions and answers to be learned by heart, the youthful soul of the future master of jurisprudence for the first time felt with alarming distinctness the whole comfortless desolation and aridity of the legal learning of the time ; it was well for him to learn by his own experience how legal instruction, if it is to animate to independent thought, must *not* be communicated."

At Easter, 1795, he proceeded to the University of Marburg. The smaller, half-rural universities of Germany have at least the advantage of bringing the students into closer personal intimacy with their teachers; and Savigny enjoyed such a friendship with Philipp Friedrich Weis, a civilian of the "positive, so-called elegant" school, which had still its adherents. Weis had a good library, ample learning, and, notwithstanding some eccentricities, the art of inspiring his disciples with an enthusiasm for legal study. In each of his earlier works Savigny gratefully mentions the incitement to it which he had received from Weis, and, "by the imposing scientific apparatus of MSS. *incunabula* and documents, which he has turned to account in all his writings, he proves himself to be Weis's true and grateful disciple."

Savigny studied at Göttingen in the winter half-year of 1796; but he found the lectures tedious or ridiculous. Having already completed his civilistic course, he did not attend the prelections of Hugo, then the ornament of that university. Only during one hour was he a hearer in Hugo's lecture-room, and in after times that distinguished civilian used to point out to his audience the spot where Savigny had sat, thereby consecrated as the place of honour. Spittler's gracious eloquence in the chair of Universal History was what most impressed Savigny at Göttingen, and to the impression made by it may partly be traced that clearness of style which distinguishes his works. For three years after this, Savigny's

studies were considerably interrupted by ill-health, but much of his time was spent with friends, who, by their own confession, derived from him benefit and incitement not less than he owed to them. Among these are the names of Becker, Pourtalès, Von Motz, Heise, Clemens Brentano, H. Lichtenstein, Klingemann, Gries. He was not dead to the influence of the great poets of Jena and Weimar, then at their zenith of fame and activity. It was the powerful, and with him life-long impression made by Wilhelm Meister, in 1800, that roused him out of the somewhat aimless and disjointed life which his illness had for a time necessitated, and "restored him to himself and to solitude."

In 1800, Oct. 31, he took his doctor's degree at Marburg. His inaugural dissertation was "*de concursu delictorum formali*" (Vermischte Schriften iv. 74), a treatise on the violation of several criminal laws by the same act, *e. g.*, perjury, in consequence of which an innocent person is condemned to death. This is ranked but little below the level of his later works. In the following winter, Savigny lectured as Privat Docent in Marburg—the beginning of forty-two years of professional activity. He delivered but one course on criminal law, and afterwards applied himself to the civil law, which he treated after Hugo's method, historically, exegetically, and systematically. The lectures he delivered on this subject in the following years, as Extraordinary Professor, made a deep and strong impression.

"I know of no public speaking (*Vortrag*)", says Jacob Grimm, who with his brother had attended his different courses, "that has more deeply impressed me than the prelections of Savigny. I think what so strongly attracted his audience was his ease and vivacity of delivery, combined with so much quietness and moderation. . . . The constant clearness of his diction, the warmth of his persuasion, and withal a kind of reserve and self-restraint in expression, produced an effect which with other men is only the consequence of the most powerful eloquence."

From the same biography of the Grimms we learn that Savigny

spoke fluently and rarely consulted his notes. His French translator, M. Guenoux, received similar impressions in attending his lectures thirty years later. He was struck with the freshness and vivacity with which a course was delivered for the twenty-fifth time. Each year, however, added a new interest, in the results of new studies, and the latest discoveries of science. "His fluent and precise language," says M. Guenoux, "illustrates so well the most obscure subjects that his pupils discover their difficulty only if at a later period they have to seek for a solution which they have forgotten."

In these years, at Marburg, his courses were on the last ten books of the Pandects, Ulpian, the laws of succession, obligations, the methodology of law, and on Hugo's history. For the labours of Hugo, Savigny always expressed high esteem, and though not his pupil, he was aided and influenced by his writings and intercourse more than by any other modern jurist. But the achievements of Hugo were but negative. His criticism had exposed the defects of the German jurisprudence of the eighteenth century, but no constructive genius had yet given an example of a better science. That jurisprudence had almost forgotten the law sources; it had constructed a "conglomerate" of Roman, canon, and German law, without rejecting or distinguishing what had become obsolete, and had clothed the whole in a fantastic dress of abstract principles and technical phraseology. Handed down from one teacher to another, dissociated from the philosophical and historical science of the time, the German jurisprudence needed another Cujacius to transform it from a mechanical handicraft to be once more a liberal study, and an important element of national culture. The first step towards realizing the reform to which Hugo, Haubold, and Cramer had pointed the way, was made by the publication of Savigny's treatise, "*Das Recht des Besitzes*," certainly the greatest event that has occurred in legal history since the sixteenth century. It was a pattern of the new method of studying the law sources at first hand.

For some time Savigny had laid aside all commentaries, and had sought in the texts of the great jurists alone a firmer foundation for his knowledge. He did not neglect, either before or at a later period, the great modern interpreters of the Roman law, especially Cujacius and Donellus, but he felt the importance of regenerating civil law from the undiluted and unadulterated springs of antiquity. In preparing in this way his prelections on the last ten books of the Pandects, he first became aware of the vast distance between the doctrine of possession taught by the classical jurists and the traditional theories then received as to "that remarkable hybrid of fact and law." Encouraged by Weis, the preparations for restoring the doctrine of the ancients were begun in December, 1802. They were completed in five months, and in six weeks more the manuscript was finished. In so brief a time was produced this unequalled monograph, which has gone through seven editions, has been translated into English, French, and Italian, and which at once placed the author, at the age of twenty-four, among the classical writers of his country.

Savigny declined at this time invitations to Heidelberg and Greifswald. In 1804 he was married, at his estate of Trages, to Fräulein Kunigunde Brentano, sister of Clemens Brentano and Bettina von Arnim, a union which lasted till his death. After visiting Heidelberg, Stuttgart, Tübingen, and Strassburg, he went to Paris, in December, 1804. On the way thither, a box containing his papers, the fruits of laborious researches in the libraries of Germany, was stolen from behind the carriage. This serious loss, however, was in some measure replaced by the aid of his pupil, Jacob Grimm, who joined him at Paris. There, in that magnificent library, whose conservators are famed for even more than the proverbial courtesy of librarians, Savigny and Jacob Grimm spent their days. Madame Savigny and one of her sisters accompanied them, and copied many manuscripts; among others, the cramped handwriting of the unpublished letters of Cujacius. In the end of 1805 he returned to Marburg. His biographers give no account of his

occupation during the next two years,\* which are memorable for the humiliation of Prussia, and the complete establishment of French domination in great part of the Fatherland. Savigny must have watched with anxiety the events of that period, and he drew from them, doubtless, many of the lessons of patriotism and political wisdom which he afterward strenuously inculcated. It was a time of trial for all Germans, but it was also a time of hope to the thoughtful among them—a crisis in their history.

In May, 1808, he was appointed Ordinary Professor of Roman Law in the University of Landshut. He remained there but a year and a half, but that time was long enough for him to acquire the unbounded love of his students, whom he inspired with the same zeal, love of learning, and self-respect, that so many had carried away from Marburg. In the preface to the seventh volume of his system, there is a story of this time, which he tells to illustrate the error of those who, in their zeal for the Fatherland, assumed the existence of an antagonism between Roman and German law.

"When I filled a chair in the Bavarian University of Landshut, forty years ago, there was there a Professor of Botany, who, be it observed, was not born a Bavarian. This man sought to manifest his exclusive devotion to the special Bavarian Fatherland, by banishing from the botanic garden all plants that do not grow wild in Bavaria, in order to have a home garden (Einen zein Vaterländischen Garten), free from all foreign productions. This course, however, was condemned by all true Bavarians in the University, who were certainly not wanting in the strongest attachment to their country."

This is a curious example of the strange extremes into

\* In the singular history of the Canoness Günderode, prefixed to the "Correspondence of Goethe with a Child," Bettina von Arnim gives a curious account of her manner of life when in Savigny's house at Marburg, and of the scenery there; but there is little relating to him personally, except that he was visited by Kreutzer. In the same book are various incidental allusions to Savigny and his family; e. g., to a festival on his birthday, Feb. 21, 1808, which was attended by Goethe's mother. (Letter to Goethe, March 15.) Others are cited hereafter.

which some natures were then led by the craving for a local nationality, and of the keenness of the provincial selfishness which has so retarded the growth of German unity. It would seem to point to some attacks on Savigny as a foreigner, which were rather ridiculous developments of patriotism in that newly formed and, as yet, incoherent kingdom. These attacks, or mislikings, must, however, have been exceptional, or at least they were soon overcome. His sister-in-law, Madame von Arnim, then lived in his family, and in her correspondence with Goethe she thus describes his departure from Landshut:—

“ The students are just packing up Savigny’s library ; they place numbers and tickets on the books, lay them in order in chests, let them down by a pully through the windows, where they are received underneath with a loud ‘ Halt ’ by the students. All is joy and life, although they are much distressed at parting with their beloved teacher. However learned Savigny may be, yet his affable befriending disposition surpasses his most brilliant qualities ; all his students swarm about him ; there is not one who does not feel the conviction, that in the great teacher he also loses his benefactor. Most of the professors, too, love him, particularly the theological ones. Sailer is certainly his best friend.

“ The swarm of students leaves no more the house, now that Savigny’s departure is fixed for a few days hence : they are just gone past my door with wine and a great ham, to be consumed at the packing up. I had presented them my little library, which they were just going to pack up also ; for this they gave three cheers. In the evening they often make a serenade of guitars and flutes, and this often lasts till midnight ; therewith they came round a large fountain, which plays before our house in the market-place. Yes ! youth can find enjoyment in everything : the general consternation at Savigny’s departure has soon changed into a festival, for it has been determined to accompany us on horseback and in carriages through the neighbourhood of Salzburg. They who can procure no horse, go before on foot : and now they are all rejoicing so at the pleasure of these last days, travelling in awakening spring through a splendid country with their beloved teacher.”

Nearly two months later, she writes:—

“Shortly after Easter we took our departure; the whole University was collected in and before the house; many came in carriages and on horses; they could not so soon part from their excellent friend and teacher. Wine was given out, and amidst continued cheers we passed through the gates. The horsemen accompanied the carriage up a hill, where spring was just opening its eyes; the professors and grave personages took solemn leave, the others went one stage further. Every quarter of an hour we met upon the road parties who had gone on before, that they might see Savigny for the last time. I had seen already for some time the tempest clouds gathering. At the post-house one after the other turned towards the window to conceal his tears. A young Suabian, of the name of Nüssbaumer, the embodiment of popular romance, had gone far before, in order to meet the carriage once again. I shall never forget how he stood in the field and waved his little handkerchief in the wind, while his tears prevented him from looking up as the carriage rolled past him. I love the Suabians.”

Here follows a vivid personal description of some of Savigny's pupils, who accompany the party to Salzburg. Again:—

“At sunrise we passed over the Salza; behind the bridge is a large powder magazine. There they all stood, to give Savigny a last cheer; each one shouted forth one more assurance of love and gratitude to him. Freiberg, who accompanied us to the next stage, said, ‘If they would only so cry that the magazines should burst, for our hearts already are burst;’ and now he told me what a new life had blossomed forth through Savigny's means; how all coldness and hostility among the professors had subsided, or was, at least, much assuaged, but that his influence had been chiefly salutary for the students, who, through him, had attained to far more freedom and self-dependence. Neither can I sufficiently describe to you how great is Savigny's talent in managing young people. First and foremost, he feels a real enthusiasm for their efforts, their application. When any theme which he proposes to them is well handled, it makes him thoroughly happy; he would fain impart to



each his inmost feelings ; he considers their future fate, their destinies, and a bright eagerness of kindness illumines their path."

Professor Rudorf describes with pardonable partiality that great Prussian or rather German movement for national culture, morality, and religion, as well as for outward freedom and worldly goods, which originated in the oppression of Napoleon, and culminated on the battle-fields of 1813. The most valuable fruit of French conquests in Germany was the conviction that complete national union, and the renunciation of all narrower interests and prejudices, were alone sufficient for the last desperate conflict with the invader. To confirm this patriotic spirit, and to elevate the standard of moral and intellectual education, the University of Berlin was founded in 1810. Suggested by Wolff, when the University of Halle was uprooted by the French, then advocated by Müller, Humboldt, and Stein,\* this first experiment of a *Hoch-schule* in a great city was endowed, in 1809, with a royal grant of 60,000 dollars a year, and the gift of Prince Henry's palace. "It was the highest example," says Fichte, "of a practical respect for science and thought ever afforded by a State, for it was given during a period of the direst oppression, and under the greatest financial difficulties ; and it was not a matter of display or of elegance that was sought for, but a means of giving health and vigour to the nation." It was a proof that the oppressed and humbled country was to be raised from the dust not so much by physical as by moral force. It was a conversion of Berlin from the French spirit and habits of thought which had possessed it since the time of the great Frederick, to be the centre of *German* intelligence.

Along with such men as Fichte, Schleiermacher, and Büttmann, William von Humboldt, the Minister of Public Instruction, named Savigny to the King, as the man in all Germany best fitted to direct the whole study of jurisprudence. "This

\* For a curious account of Wolff's conversion of Stein, who had been opposed to the plan as dangerous for the morality both of citizens and *Burschen*, see Russell's *Modern Germany*, ii. 58.

man," said the minister, "known by various universally admired works, must justly be ranked among the most eminent living jurists of Germany; indeed, with the exception of Hugo, of Göttingen, no one can be compared with him, since he is distinguished as well by the philosophical treatment of his science as by his genuine and rare philological learning." In May, 1810, Savigny left Landshut, and in June became a member of the commission for organizing the University of Berlin.

One of the first cares that engaged his attention related to the constitution of a *Spruch-collegium* (Collegium Juridicum) in connexion with the Juridical Faculty. The share which the German universities took in the administration of justice is a curious feature in their history. Originating, probably, in Italy (*Geschichte d. R. R., in Mittelalter*, vol. iii. § 86), this system was widely extended in Germany. There the *Spruch-collegium* had not a jurisdiction; but courts were authorized to communicate to it the documents and pleadings (*Acten-versendung*) in any cause, and were bound to accept and promulgate its decision. In some parts of Germany this reference was made at the desire of the parties, in others it belonged to the *officium* of the court; but in all cases the latter alone designated the faculty, the parties having the right of declining thrice (*jus eximendi*). The University of Berlin being the first foundation of the crown of Prussia, and not deriving its charter from the emperor, there was some hesitation as to giving it a *Spruch-collegium*, chiefly, it appears, because Frederick II., in his law reforms of 1748, had declared the awards of universities to be incompatible with the strict observance of the Prussian law. Savigny, however, saw in this institution not only an important auxiliary to legal education, but also an organ by which scientific law might influence practice. He thought the new university was bound to improve and elevate this agency, which had been subject to many abuses, and to use it for its highest purpose, "to produce a life-giving co-operation and mutual influence of theory

and practice." It was one of the main objects of his life to counteract that ever widening gulf between theoretical and practical law which he saw to be the crying evil of German jurisprudence. Next to the study of that body of law, in which principles were most intimately combined with their application, he knew no better remedy than in the proper regulation of an institution which connected teachers and speculators with the actual affairs of the world.\* In a university founded for such ends as that of Berlin, he was the more ready to yield to his natural tendency, and to postpone the special laws and apparent interests of Prussia to the general weal of Germany; and he felt that the real interest of Prussia lay in leading, not in keeping aloof from the nation. He succeeded in establishing a *Spruch-collegium*, composed of all the ordinary professors of the faculty of law, and entitled to deal with cases remitted from other German States than Prussia. In it Savigny himself, although free to decline its duties, laboured with such zeal that 138 reports, in his firm, clear handwriting, exist in the first three volumes of the archives of the Faculty, dating from its foundation to his retirement from it in 1826.

Nor in the teaching of law did he submit to the natural tendency to give the first place to the municipal code of Prussia. He insisted on the appointment of another "Romanist;" and Hugo, Heise, and Haubold having declined, he obtained the younger Biener. On 10th October, 1810, he began his own winter lectures, on the Institutions and the History of Roman Law, before forty-six students, among whom were Göschel, Dirksen, von Rönne, von Gerlach.

Immediately after his arrival at Berlin, he became acquainted with Niebuhr, who speaks in his Roman History with affectionate gratitude of the learned intercourse he enjoyed with Savigny, and who always considered himself deeply indebted to him for the acquisition of new ideas, as well as for a sympathy that was the best stimulus to his genius. (Life and Letters of Niebuhr, i., 305, Engl. tr.) Savigny attended in

\* Comp. Syst. i. Vorr. p. xxi.

that first winter his lectures on Roman history. "Thus arose," says Professor Rudorff, "that mutual interpenetration of Roman law and Roman history which still characterizes, in an equal measure, the writing of Roman history and Roman jurisprudence." In summer, 1811, began the personal contact of Savigny and Eichhorn, who then came to Berlin to teach German jurisprudence. Taking the same views as Savigny as to the origin of positive law, Eichhorn did for the regeneration of his own department nearly what Savigny did for the modern Roman law. The former built upon the method and discoveries of Jacob Grimm, as the latter was aided by those of Niebuhr.

In the first election of a rector for the new university, eleven votes were given for Fichte, and ten for Savigny; but as the former desired to be relieved from the burden of public business, the office fell to Savigny as second in order. It was now the era of "Liberation," and his term of office was made illustrious by the empty halls of the university; by that "frequentissimum scholarum fausta infrequentia, in which," says the biographer, "the rector announced the prelections in the catalogue, but himself held none, because in the previous winter he had read the Pandects before but ten students, all disqualified for military service;" and he himself was now an active member of the committee for organizing the Landwehr and Landsturm of Berlin.

In 1814, and for some years after, he was tutor of the Crown Prince in Roman, criminal, and Prussian law. In the same year appeared his famous pamphlet, "*Vom Beruf unseres Zeitalters für Gesetzgebung und Rechtswissenschaft*." There was a very general feeling in Germany in favour of internal unification by means of a code. Some wished to adopt that promulgated in Austria in 1811; others to form a new one; and Thibaut, who first gave expression to the common desire,\* hoped that the representatives of the different States then

\* "Ueber die Nothwendigkeit eines Allgemeinen bürgerlichen Rechts für Deutschland," in *Civilistische Abhandlungen*, pp. 404—466.

assembled at the Congress of Vienna would help to realize it. This distinguished jurist was a warm and genuine patriot, as his great adversary in the "friendly struggle"\* was ready to confess; but he belonged to that philosophical school, fed on the theories of the eighteenth century, which believed that law can be produced, of the desired quality and at the shortest notice, on any soil. This belief was an offshoot of that extraordinary presumption, born of intellectual conceit and the pride of knowledge, which, in alliance with the maniacal strength of human misery, achieved such a mighty revolution in religion and politics, and which, having lost all respect for a past that seemed prolific only of abuses, imagined the present capable of realizing absolute perfection. It placed the end and goal of jurisprudence in a universal code for all nations and all times; a code so complete as to give a mechanical guarantee for equity and justice, and it demanded, in that spirit, a common legislation for Germany.

Savigny's reply was in the spirit which the 19th century was already bringing to bear on philosophy, science, and literature. It was an application and development of the lessons of Vico and Montesquieu, which may be summed up in that thought of Pascal, which considers, "*toute la suite des hommes pendant le cours de tant de siècles comme un même homme qui subsiste toujours et qui apprend continuellement.*" The past was not to be studied merely that abuses might be exposed, or an imaginary perfection idolized; it was to be examined with a profounder attention, as the parent and nurse of the present and the future. Old things were regarded as the foundation of new, instead of being swept away with the besom of destruction, in order to make room for them. In fine, then arose that school which has not yet accomplished its work, which inculcates reform instead of revolution, a historical school, whose functions are not confined to the realm of jurisprudence.

\* Niebuhr (*Life and Letters*, ii. 268 Engl. tr.) calls it "an acrimonious contest, which, however, terminated reasonably."

With a more loving regard for the past, a more earnest devotion to his own science, free from the spell exercised by the dream of mere outward uniformity, Savigny came forward as the champion of the common law ; recognizing indeed the value of legislation and codification, but requiring the former to proceed from the opinion and wants of the nation itself, and placing the latter in its true position, as a question of expediency, not a matter of necessity. He showed that legal science was only in its infancy ; that it would be folly to stereotype and fix for ever a state of the law obviously so imperfect ;\* that Austria and Prussia would not give up their own new codes ; and that, therefore, any attempt at general codification would most probably result in a permanent division of the nation into two halves. He pointed out the defects in all previous attempts at codification—in France, Austria, and even in Prussia. He showed that the want and the vocation of the age was rather for progress in a common jurisprudence ; and he maintained, with an earnestness and conviction that arose from a worthy but modest self-consciousness, that the nation had yet freshness and vigour enough to produce great jurists, and an intellectual fecundity that would only be hampered by the codifications that suited ageing nationalities. In his view, “the call for codes arose from indolence and dereliction of duty on the part of the legal profession, which, instead of mastering the materials of the law, was overpowered and hurried headlong by their overwhelming mass.”

Savigny's view of the whole subject of codification was based on his conception of the nature of private law, as originating directly from the people. Whatever may be the functions of the State in ordering and protecting its own existence through public and criminal law, private law proceeds

\* “Optandum esset, ut hujusmodi legum instaurationi illis temporibus suscipiatur, quæ antiquioribus quorum acta et opera tractant, literis et rerum cognitione præstiterint. . . . Infelix res namque est, cum ex judicio et delectu ætatis minus prudentis et eruditæ antiquorum opera mutilantur et recomponuntur.”—*Bacon de Augm. Sc. L. 8 c. 3* (quoted by Savigny *Vom Beruf, &c.*, p. 21).

immediately from the actions of individuals. The customs and precedents, the usages of merchants, and those of courts, are not merely the primitive, but the permanent organs of legal progress.

He did not conceive the law as immutable, an heirloom that must not be bartered or changed. This charge against the historical school was unfounded. "The human body," he said (*Zeitschr* iii. 4. *Stimmen für und wider neue Gesetzbücher*), "is not unchangeable, but is incessantly growing and developing itself; and so I regard the law of each nation as a member of its body, not as a garment merely that has been made to please the fancy, and can be taken off at pleasure and exchanged for another." He pointed out, too, the source of the whole agitation for codes, the attempt to rectify the law from above and at one stroke, in the tendency of the time, "alles zu regieren, und immer mehr regieren zu wollen."—(Ib. p. 44.) In fine, he pointed out that the "historical spirit is the only protection against a kind of self-deception, which is ever manifesting itself in individuals as well as in whole nations and epochs—that which makes us fancy what is peculiar to ourselves to belong to universal humanity. Thus, in time past, some, by leaving out prominent peculiarities, made a system of natural law out of the Institutes, and deemed it the very voice of reason; now there is none but pities such an error; yet we every day see people hold their juridical notions and opinions to be rational only because they cannot trace their genealogy. Whenever we are unconscious of our individual connexion with the great universe and its history, we necessarily see our own thoughts in a false light of generality and originality. Against this we are protected by the historical spirit, which it is the most difficult task to turn against ourselves."—(*Vom Beruf*, 115.)

It was not surprising that Savigny's views should kindle opposition among the numerous party interested in maintaining the principles of the French rule, who hoped to be allowed to apply these principles for their own interests as

soon as the old German tendency to isolation of races and territories again dared to manifest itself. Professor Gönner, of Landshut, a representative of this class, accused Savigny of democratic views, and a desire to place the sovereign prerogative of legislation in the hands of the people and its jurists. He considered a code for all Germany inconsistent with a federation of sovereign states.\* He desired to obliterate every trace of common nationality, and the very appearance of State subjection, although he had pressed on the States forming the Confederation of the Rhine the uniform adoption of the Code Napoléon, pure and simple. Savigny's reply† was crushing. He insisted on freedom as necessary for the development of law, as well as other functions of the intellectual life of nations. But he urged above all the preservation of every institution that supported or confirmed the national unity. He knew how important it was to withstand that spirit of "particularism" which is unable to see the wood because of the trees; he was fully aware of the value of local and municipal institutions, but he felt that unity was of still more vital importance to his country.

For the maintenance of such principles and the cultivation of historical jurisprudence, Savigny, Eichhorn, and Göschen had established in 1815 the "*Zeitschrift für geschichtlichen Rechtswissenschaft*." The same objects which this journal had in view were still more efficiently aided by the great works of its chief conductors, Savigny's "*History of Roman Law in the Middle Ages*," and Eichhorn's "*Deutsche Staats- und Rechtsgeschichte*." Savigny's third great work exhibits the strange and unexpected result of the continuity of the Roman law during the darkest period of European history; and it depicts its resurrection and second life in the jurispru-

\* Similar was the view of Almendingen (*Politische Ansichten*, Wiesbaden, 1814), who applied the "national theory" of law to the little states of Germany, confounding the notions of state and nation, and demanding a special code for each state.—"*Ein neues Trennungsmittel für die Deutschen*," *Zeitschrift*, iv. 32.

† *Zeitschrift* vol. i. *Verm. Schriften*, iii, No. 52, p. 167.



dence and literature of the Middle Ages. Professor Rudorff ascribes it to a special interposition of Providence in behalf of the historical school, that just when the veil had been lifted from the Middle Ages by the gigantic labours of Savigny, the obscurity that had enveloped the more remote antiquity of the Roman law was in great measure dispelled by the discovery of the institutions of Gaius. The Roman law was thus traceable in its whole growth, from the old forms of the Republic, through the remains of the classical jurists, the Pandects of Justinian, its flickering life in the church, the municipalities, and the universities, till its revival in the schools of Bologna, and its reasserted predominance in the tribunals of the Germanic empire. We quote here the eloquent words of Professor Rudorff in describing the historical school :

“The masters of the older schools had acknowledged only statutes as sources of law. The primitive customary law growing up out of the autonomy of individuals and the decisions of judges, and the legal profession, the natural representative of the nation in legal affairs, had in their eyes a scarcely tolerated existence. An international law without the State they were in all consistency obliged to deny. Now, the municipal law escaped from that legislative arbitrariness, that system of constraint in the domain of law, as theoretical politics shook off the arbitrary doctrines of the social contract or of conquest,\* as historical literature shook off the *pragmatismus* which pretended to explain everything by individual purpose and deliberate design. Law stepped out into the general highway of intellectual history, and the more precise formulation of the law giver, who stands in the centre point of his people and his history, appeared henceforth but as *one* of its manifold organs.

“The previous jurisprudence was wholly dogmatic, and its dogmas consisted only of wearisome logical categories, and rules for interpreting the legislative will. The jurists of the 18th century wanted altogether the historical and even the genuine systematic sense, which deals with what is organically connected. The history of law to the rationalist lawyers was only a catalogue of the aberrations

\* See Savigny's System, i. 32.

tions of the human mind; to the positivists it was a worthless collection of defunct and useless antiquities. The historical school restored to jurisprudence, besides the juxtaposition of cotemporary facts, the regular succession of a series of varying forms, in which we become aware of the presence and operation, from first to last, of the same national life, uniting, individualizing, developing the whole. To it legal history is no longer dead matter. It knows only an immanent, not a transitory past, the knowledge of which is no superfluous, or at the best useful, preparation; but the whole of jurisprudence is as much history as system, only a different arrangement distinguishes the freedom of historical development from the necessary and well-proportioned systematic unity of the manifold institutes."

Perhaps the most plausible objection to the historical school was founded on its supposed want of all higher philosophical thought. It was accused of standing aloof from the ideal. The works of Savigny alone, full of the soundest philosophy, stated in the most transparent style, are enough to refute this notion. The historical school only demands division of labour; it asks to have its own office duly appreciated, but it does not pretend to exist without using the aid of a rational and reflective jurisprudence. The two tendencies are inseparable as soul and body. Savigny confined himself with rare self-denial to the exposition of the law on its historical side, and in its external form. He never loses sight of the worldly interest of his subject in "speculations on the philosophy of legal history or the physiology of peoples, nor obscures the classical simplicity of his outlines by metaphysical deduction, the romance of theological colouring, or the dangerous play of etymological fancy." His own answer to the want of philosophical thought with which his history has been charged, stands in the *Zeitschrift*, iii. p. 5.\* "No confusion," he says, "is more pernicious than that of micrology with special knowledge of details. Every reasonable man must estimate micrology at a very low value, but accurate and minute knowledge of details is so indispensable in all history that it is the only

\* *Lerminier, Hist. du Droit*, p. 355.

thing that can give it value. A legal history not based on this thorough investigation of particulars can give, under the title of great and powerful principles, nothing better than a general and superficial reasoning on half-true facts—a procedure which I deem so barren and fruitless, that, in comparison with it, I give the preference to an uncultivated empiricism.”\*

He belonged to none of the great schools of philosophy which rose and fell during his long lifetime. But there is a lofty ideal present and often visible in his works. He conceives law as having its end and aim in man’s moral nature—as being the realization or rather the servant of “*das Sittliche*.” But as morality is now inseparable from Christianity, he finds the highest motive of the law in the deeply ethical spirit of our religion. In a remarkable passage,† written at a much later period of his life, after comparing the positive and rational sects of lawyers, those who regarded only the individual and national, and those who chiefly contemplated that which is common to human nature, after recognising an element of truth amid the one-sidedness of both parties, and rejoicing in the prospect of progress afforded by their approximation, he proceeds thus:—

“The universal office of all law may then be referred simply to the moral determination of human nature,‡ as it appears in the Christian view of life. For Christianity is not merely to be acknowledged as the rule of life, but it has in fact transformed the world,

\* The application of these principles to the History of Roman law in the Middle Ages will be found in a letter of Savigny, cited in the “Notice” in the French translation, p. 21.

† System, i., 53.

‡ This phrase is explained at a subsequent part of the same volume (p. 381). “Man is placed amid the external world, and the most important element in this surrounding is his contact with those who are his fellows in nature and destiny. But it is possible for free beings to co-exist in such contiguity, mutually benefiting, and not hindering each other in their development, only by recognition of an invisible boundary within which the existence and the activity of each individual may obtain secure and unembarrassed scope. The rule by which that boundary, and by it that free space is determined, is the law. This implies at once the affinity and the difference between law and morality. Law serves morality, not however by executing its commands, but by securing the free development of its power residing in every individual will.”

so that all our thoughts, however alien or even hostile to it they may appear, are yet controlled and pervaded by it. By this recognition of its universal end and aim, law is not absorbed in a more extensive domain, and robbed of its independent existence; it is rather a distinct and peculiar element in the successive conditions of that general problem; it has unlimited sway within its own province, and it only receives its higher truth by its connexion with the whole. It is amply sufficient to admit this one aim, and it is unnecessary to place by its side a second of a totally different kind under the name of the public weal; to assume in addition to the moral principle one independent of it in political economy. For, as the latter strives after the extension of our dominion over nature, it can only tend to increase and ennoble the means by which the moral ends of human nature are attained. But this includes no new aim."

And the author goes on further to distinguish the general and particular elements of law, and to show that one of the principal functions of legislation is to regulate their reciprocal action, to reconcile them into a higher unity, preserving the philosophical principle, without killing the national spirit and individuality. We have been insensibly led to anticipate by quoting from Savigny's philosophy of law as it was twenty-five years later. But it was not in substance different from that of the "*Beruf*" and the "*Zeitschrift*." It was only mellowed and enlarged by experience and riper knowledge.

The polemic against the historical school gradually ceased as its profound scientific theory was disseminated more and more widely by the works of Savigny and Eichhorn, by Biener in criminal law, Bethmann-Hollweg in the law of judicial procedure, and by many others, till it has become the common property of all. Englishmen have always had a holy awe for precedents, and have studied their own past in a reverend and yet independent spirit, which makes it difficult to say whether they more highly esteem the past because it is the parent of the present, or the present because it is the offspring of the past. Their theory of law (if they can be said to have had one) was ever that expressed by Sir James Mackintosh. "There is but

one way of forming a civil code, either consistent with common sense, or that has ever been practised in any country, namely, that of gradually building up the law in proportion as the facts arise which it is to regulate." It is difficult for them, therefore, to realize the difficulty and importance of the task which the historical jurists accomplished. But for Jeremy Bentham it would have been more difficult still. The long cessation of all improvement had opened so wide a gulf between the law and the wants and sentiments of the nation, that Bentham and his school saw no better way of filling it up than by overthrowing the whole fabric of the ancient jurisprudence, and rearing a new system out of human brains. Happily this was not necessary. Bentham's writings gave a mighty impulse to legislation, which had so long been idle or mischievous; but they did not lead us either to revolution or to wholesale codification. He had indeed fallen into the same idolatry of his own genius, and the same oblivion of the claims of the past, of which the continental theorists were guilty. But his mistake was counteracted in great measure by his laying down as the guiding principle a lower, or at all events a more practical object, the happiness of mankind. This principle, abstractly less perfect, but actually less liable to perversion than the transcendental or *à priori* systems of the last century, far more than his elaborate codes, has mainly influenced the legislation of the last thirty years in Great Britain.

But the external circumstances of Germany differed still more widely from ours than their juridical habits and position. There abuses were greater, attachment to existing institutions feebler, the spirit of speculation more powerful, and French example more infectious. The tendency, therefore, was to systematize: codes were actually formed and enacted in Prussia and Austria; and it is owing to the labours of Savigny and his followers that the whole law of the country, except such code, has not become a blank. It is no derogation from his transcendent merits, to say that much of the success he

won arose from his clear perception that the cause of the common law was the same with that of national unity, which exerts so strong an influence on the German mind. The German States and the two divisions of this island occupy converse positions. Here there is political union, legal and educational separation; there the common law and the universities are the great bonds of union, and Savigny and his school were thus able to persuade a nation, one of whose cravings is for the political unity they have not, to stand by the institutions which feed and stimulate that desire.

How so great a mind as Savigny's should devote itself to a field apparently so narrow as the Roman law; how a spirit so patriotic should so reverence what seems foreign and antiquated, can be strange only to those who have superficial notions of the power and value of that system, which has been to modern jurisprudence far more than Plato and Aristotle to modern philosophy. Especially in the Germanic empire, which the Middle Ages regarded as the centre of Christendom, as the author and dispenser of the only true law, amid the discordant variety of national and tribal customs,—especially in Germany, was the Roman law a principal element of national education. To expel it in accordance with the fancied requirements of nationality and of the age, would have been as impossible and chimerical as the extinction of other foreign elements of culture that had taken root in the soil,\* such as the influences of classical antiquity, the poetry and art of Italy, or Christianity itself. “For,” says Rudorff, “it is just the exotic plants in the provinces of religion and law that are the noblest of all that grow on German soil. Their extinction must reduce us to barbarism. Their bloom is the ornament and the honour of our people.” Savigny has expounded his own views of the present position and value of Roman law with dignity and conciseness, in the prefaces to the first and seventh volumes of his system. He disclaims every thought of exalting the Roman jurisprudence at the expense of the

\* System, vol. i. Vorr. p. xxxi. vol. vii. Vorr. *vide ante* p.

German; but he desires that the intellectual gifts God has given to other nations and times should not be contemned or excluded, and therefore he prizes the Roman law. But he estimates it still more highly because "for us Germans, as for many other nations, this foreign element centuries ago became a part of our legal life, and thus, mistaken or half understood, it often has pernicious effects, where, if rightly apprehended, it can only enrich our proper legal life. We have not to ask, therefore, whether we can neglect or ignore the Roman law, like some newly-discovered island, or whether we shall strive to appropriate it with all the benefits and the difficulties which it may involve. We possess it already; our whole juridical thought has grown up with it, and the only question is whether our minds shall be unconsciously subjugated by it, or rather in full consciousness be strengthened and enriched."\*

But Savigny was not attracted only by the historical importance of the Roman law; he heartily recognised its value as an example. He saw in it the finest specimen of the union of theory and practice, which in Germany were separated far more widely, or at least more obviously than in this country, where theory has hardly a status or a follower peculiarly its own. He urged on his students an earnest study of the Roman jurists, just as we study other productions of antiquity with delight and admiration. He demands this, not in order to apply them practically, but to acquire the logical acumen that pervades them, and to learn to manage our much richer materials with like deftness and safety. To him a superficial knowledge of their general principles seemed but lost labour.†

\* *System*, vol. vii. Vorr. p. 7. The thought expressed in the last words is more fully developed in various passages of his writings. The point of view from which Roman law is regarded by a German lawyer is essentially different in this respect from that of the Englishman. Yet amid the attention which it is now receiving in this country, the views of Savigny as to its influence and position are of great interest and importance. They should be compared with those of Mr. Maine in his "Ancient Law," and in his paper in the "Cambridge Essays," for 1856.

† "There is an opposite and widely spread opinion that the Roman law can and must be taken more easily, that we may be satisfied with what is called the spirit of it. This spirit consists of what are called institutions, which may be useful to enable us at first starting to find our bearings: the

Such were the profound and earnest views of Roman jurisprudence that Savigny's flowing eloquence conveyed to the youth of Germany. He had the most extraordinary gift of oral teaching.

"The very external nobility of his appearance, the stately classical repose, the gentle earnestness of his personal bearing, could not but win the youthful heart to himself and the science he taught. Borne on the deep musical tone of his voice, the lecture, perfectly free, yet ready for the press, flowed on with magic ease, clearness, and elegance. Still more satisfying was the master's constant incitement to independent thought. Principles were laid down clearly and simply, but the most lively exegesis led directly into the casuistic workshop of the Roman jurists. It taught the hearers to apply those principles; and the wise restriction of the matter, instead of complete satisfaction or satiety, produced ever a new desire for further progress."—(Rudorff, p. 47.)

His views of the professional office were very elevated. He addressed himself especially to the middle classes, which, he said, were most susceptible and most in need of a stimulus to higher things, and whose spiritual guidance is the most important. He held in his "Essay on German Universities" (*Verm. Schriften* iv., No. 43, pp. 307, 308), that for their sake the teacher is called upon to strive after genuine popularity. In the university, as in the State, strength and permanency depend not on "heroes and statesmen, on artists and men of learning and genius, nor yet on the hewers of wood and drawers of water, but on the numerous intermediate class that devotes itself to intellectual labours, to agriculture and trade, in innumerable forms and ranks, and on the sound sense and active disposition that prevail among these orders."

When we consider the marked separation between the literary and the working and trading public of Germany, this

most general notions and propositions, without critical examination, without practical application, and above all without looking to the law sources from which all first acquires true life. This is quite useless, and if we will do no more, even this little time is entirely lost."—*Beruf.* pp. 124, 125. *Comp. Syst.* vol. i., Vorr. p. xxvi.



appreciation of the middle classes by one of the former is noticeable. Mr. Laing and Mr. Buckle have pointed out how the thinkers of that country address a narrow and highly cultivated order; and thus, writing only for each other, have come to use a learned language almost unintelligible to the mass of their countrymen. The effect of the wide separation of the speculative and the practical classes is seen in the wildness of philosophical thought, and in a disregard of the traditional feelings of the vulgar. In such feelings, in the instinctive veneration for the past which appears in itself so unreasonable, we have the main security for the order and permanence of society; and it was not the least of the services of the historical school that it gave a rational foundation to this vague and superstitious reverence. Thinkers, cut off from the influence of popular prejudices, were for remodelling the world, at least the world of jurisprudence. Savigny and his fellow labourers transferred a prejudice from the minds of the people into the schools of philosophy and the councils of princes, stripping it of its fantastic ornaments, and presenting it in the naked simplicity of scientific truth. Indeed, the vulgar, in its blind veneration of what has been, is in one respect superior to the "unhistorical" sect. The continuance and power of that sect arise simply from the fact that so many unconsciously confound their own personal contemplation of the course of the world with the world itself, and thus, as Savigny has expressed it, "deceive themselves into the imagination that the world has commenced with them and their thoughts. Of course, none of them are conscious of this; it remains an obscure feeling that comes to light only in special instances, but the fact is proved by more than one literary phenomenon of the century." It is the same incapacity to realize the element of time as a factor in all mundane results, which Lessing describes in a famous passage\* as the

\* "Have you ever read a paper of Lessing's which alarms pious persons, but is none the less worthy of a profound philosopher—*Die Erziehung des Menschengeschlechts*? There is in that paper a sentence of the deepest significance. 'The enthusiast,' he says, 'and the philosopher are frequently

characteristic of the enthusiast. We shall see immediately how Savigny's share in the affairs of the world helped to save even him from some of the errors of the solitary student.

Savigny, like Arnold and John Wilson, like Fichte, Schleiermacher and Neander in his own university, exerted even a greater influence by his qualities as a teacher, than by his learning and genius. He aimed at cultivating the heart as well as the head, and the success of this system is evidenced by the position he occupied for two generations; for so long he was the chief name and authority, not only in his own department, but for the whole extent of jurisprudence; not only in Germany, but among cultivated jurists of every land. Italy, to attend whose legal schools crowds of northern students crossed the Alps in the Middle Age, has adopted his system as a text-book in the mother school of Bologna. In the sixteenth century, the civilians of France were the leaders and the lights of jurisprudence; but now Goethe could say, "Although in olden times they (the French) did not dispute our diligence, but yet regarded it as tedious, and burdensome, yet now they esteem with peculiar regard those works which we also value highly. I refer especially to the merits of Niebuhr and SAVIGNY."

Besides this life of learned labour and intellectual influence, Savigny's character received a fuller development by his share in public business. In 1817, he was appointed a member of the Department of Justice in the Council of State (*Staatsrath*). In 1819, he became member of the Supreme Court of Cassation and Revision for the Rhenish Provinces. In 1826, he became a member of a commission of high state functionaries, for revising the Prussian Code. These accumulated labours caused a nervous complaint, which rendered necessary, from 1825 to 1827, more than one lengthened residence in Italy.\*

only at variance as to the epoch in the future at which they place the accomplishment of their efforts. The enthusiast does not recognise the slowness of the pace of time. An event not immediately connected with the time in which he lives is to him a nullity.'"—*Niebuhr's Life*, ii. 242, English translation.

\* At this time, he seems to have been exposed to various annoyances, and Niebuhr urged him to renounce his political entanglements, and to retire to

To this enforced leisure, his country owed the papers on the German universities and on legal education in Italy, which were first published in 1832. While his official duties may have given less time for the pursuits which were more properly his own, he himself estimated them very highly, as means of intellectual growth and invigoration. He writes, in his essay on the universities, "Kept within proper limits, this disturbance may afford a wholesome counterpoise to the one-sidedness of a class of learned men, and thus by extending the view, and by imparting life to the mere study of books, exercise the most salutary influence on the educational profession." (Verm. Schr. v. 297.) In the same place, however, he warns that the participation in active business must not be allowed to engross too much time, strength, or interest, to the detriment of professional duties. "However decided," he says, "may be the call to active life, the duty of the teacher is too earnest and too honourable to be fulfilled but with perfect strength and devotion; and he who regards the matter honestly and conscientiously, will rather renounce it, than degrade it by careless and imperfect performance."

Very early Savigny recognised the importance of free institutions to the legal profession, and to the law itself. "What have we jurists to cling to," he wrote in 1816, "and raise ourselves up to? What helps in England, and what helped in the old free States, were free home-born forms of government, with an inheritance of national usages (*Volkssitte*), which draw fresh life from their very exclusiveness; of such means we have none." He found the only substitute for them in the scientific spirit which has produced so many excellences and defects in German jurisprudence.

He also points out very clearly the advantage of participating in political power, as an element in the cultivation of all classes. This argument ought to have had some weight in favour of

a life of study at Bonn, where he himself had then settled. From another letter of Niebuhr, it would seem that Savigny's health had improved under homœopathic treatment."—(Life and Letters, ii., 354, 368, English trans.)

popular government where education is so highly prized as in Prussia. But for generations it has been a political axiom at Berlin "to do everything for the people, nothing through the people;" and Savigny was not free from this prejudice of his country. Some of his views were expressed, we cannot help thinking, in a way that could only aggravate the impracticalness which has retarded the progress of German constitutionalism. In England, the people has always sought for "material guarantees" for liberty, without probing too deeply the ethical or metaphysical springs on which they depend. If we were now struggling for popular institutions, we should not highly appreciate the doctrine, "that the antithesis of despotism and freedom can be conceived in conjunction with the most various forms of constitution. An absolute monarchy may, from the spirit of its government, be free in the noblest sense, just as a republic is capable of the severest despotism; although, indeed, many forms are more favourable to the one or the other of these conditions." This is a clear statement of an important truth; but is a symptom of that fulness of knowledge which overshoots the mark of practical utility—that completeness of theory which omits to make provision for the wants of every-day life.\* What was needed in Germany was the strong conviction and the authoritative exposition of the truth conveyed in the saving clause which closes the sentence. England reserved the assertion of the general truth, that tyranny was equally possible under a democratic and a monarchical government, and contented herself with securing the best safeguards for her own liberties, in an equitable counterpoise of classes.

Here is another doctrine which may be appreciated, but can hardly be beneficial in Germany, namely, that the difference between despotism and freedom is simply, that "in the one case the ruler regards the nation as inanimate matter with which he may deal as he pleases, in the other as an organism of a nobler

\* We find the same views in Savigny's *Philosophy of Law* (System i. 39, 40), in a less objectionable position.

kind, at the head of which God has placed him, of which he is an organic part," but whose powers, bestowed by nature and developed in its history, he is bound to respect.\* In this creed we detect a bias to that divine right which plays so important a part in Prussian politics. However imperfect, or, rather, ill-timed, the expression of these truths may seem to our apprehensions, Savigny did influence wisely and powerfully the constitutional tendencies of North Germany. He showed clearly in his paper on the municipal institutions of Prussia,† that there was no necessary opposition between monarchy and the democratic elements of nations; rather that monarchy, instead of being endangered by their operation, may draw life and strength out of them. There is, however, a propensity to confine the democratic forces to parochial and municipal administration, and leave to the monarchy the unchecked disposal of the central government. "It is," he says, "in the communal institutions that these democratic institutions can exert their influence with a more natural and more wholesome effect than elsewhere. The origin of the error (an absolute contrast between the democratic and monarchical elements) lies in the confusion of two quite different political antitheses—the distinction of monarchical or republican constitution, and that of a more central or local administration." We should also notice his urgent inculcation of earnestness and conscientiousness in the use of political power, addressed to the teachers and students of the German universities.‡

After making every allowance for the faults and errors, some of which have been noted, the works of Savigny probably contain larger stores of political wisdom than those of any lawyer, except one or two of the great luminaries of English jurisprudence. He is equally distant from those extreme sects of which the one knows no past, and the other can conceive of no future, because the former ignores or denies

\* *Zeitschrift*, i., 386. *Verm. Schrift.*, v., 131.

† *Verm. Schrift.*, v., 208.

‡ *Verm. Schrift.*, iv., 298, 299.

the existence of vested rights, and the other rejects every amelioration demanded by the times.\*

The System of Modern Roman Law—the great work for which the dogmatic monograph of his earlier years, and the vast historical and exegetical labours of his middle life, were but an appropriate preparation—was begun in order to give him the consolation of labour after the death of his only daughter, who, married to Constantin Schinas, a Greek statesman, died at Athens, in 1835. This work is not easily to be overrated. If it had been finished, it would have embraced the whole scientific jurisprudence of the nineteenth century. As it stands, it not only shows the way in which Germans must proceed in order to precipitate what is obsolete and what has been foisted in, from what is genuine and subsisting—what is foreign, from what is purely national in their law; but it also presents to foreigners a grand pattern of what a system of jurisprudence ought to be. The first five volumes appeared in quick succession in 1840 and 1841, but more burdensome and more important labours than he had yet sustained delayed the execution of the rest. The Minister von Stein had long since indicated Savigny as the future “Grosskanzler” of Prussia. His merits and his works confirmed the foresight of that great statesman, and in March, 1842, he took leave of his students, and of the career in which he had employed his energies and influence for forty years.

Savigny's office placed him at the head of the new ministerial department for revising the laws. In this position he strove, not for a new codification, but for the excision of what was antiquated or falling into disuse. In the provincial laws, he sought rather for scientific elaboration than codification. The most important result of this period of legislation were the laws on bills, which led to the first general statute of the German States in modern times.† Not less enlightened reforms were effected in the removal of arbitrary and capricious grounds of divorce, and in the absence, in his project for a

\* See System, § 400.

† See System, vol. viii., p. 150.

criminal code, presented in 1845, of all punishments, such as flogging, confiscations, &c., which lose sight of the moral aims of penal law. A vain attempt was made to introduce oral pleadings of parties before the judge, a reform desired by Frederick the Great; but it could not be adapted to the existing law of procedure. A pamphlet by Savigny advocated a better system in divorce causes, which was adopted in 1844.\* In 1848, he ceased to hold an office, which was then shorn of many of its prerogatives by the increased share of the public in legislation. Although never so obnoxious to the Liberals of Germany as his colleague, Eichhorn, the Minister of Public Instruction, it would perhaps have been better for Savigny's fame that he had not for seven years been one of a retrograde ministry—the creatures (Humboldt calls them sycophants) of an absolutist king. The jurists of the historical school who have become statesmen, have too often been justly liable to the charge of ceasing in politics to regard the past as merely explaining the present, and of having come to venerate in the present every institution that had any traditions or root in the past.

Savigny could now proceed with his proper work, having leisure to continue his *System*, of which only one volume (the sixth, in 1847) had appeared during his tenure of office. In October, 1850, the congratulations of the universities, academies, heads of law courts, and administrative departments, gave to the fiftieth anniversary of his doctorate the lustre of a national festival. He himself prepared, as a thank-offering and memorial, a collection of all the detached papers he had written during the half-century.† He looked back with peculiar pleasure on his share in those resuscitations of ancient law sources which signalized that period. In one form

\* As early as 1816 he had disapproved of the scandalous laxity of the Prussian law of divorce. (*Zeitschrift*, iii., 25).

† Professor Rudorff notices the accidental omission in the "*Vermischte Schriften*," of the review of Glück's "*Intestaterbfolge*," which appeared in 1804, in the *Jenaische Literaturzeitung*, and which Savigny acknowledged as his when a question arose whether it was written by him or Heise.

or another, he had shared in them all. He was the first to restore Ulpian to his original rank. In the Academy, and through his friends and pupils, Göschen and Bethmann-Hollweg, he first recognised the value and significance of Niebuhr's discovery of Gaius in 1816. It was he who, through the Academy of Sciences, opened a new source of knowledge of Roman law, in the systematic collection and critical examination of Latin inscriptions all over Germany—an undertaking attempted at great expense, but soon renounced under the ministry of M. de Villemain, in France.\* This labour the enthusiastic biographer hopes will result in not less glory to Germany, and not less advancement to ancient learning, than the older sister study, "epigraphik," has done for the Greek language.

With this retrospect he intended to end his literary work. He was, however, prevailed on to finish, in 1851 and 1853, two volumes, containing the general portion of the "Obligationenrecht," which he deemed the most necessary of the special subjects embraced in his System. He did this at the pressing request of an old friend and pupil of the Landshut era, the Baron von Salvotti, distinguished for his share in the reform of legal education in the Austrian universities. He repeatedly refused the entreaty to expound the true doctrines of *Culpa* and *Interest*. He finished his literary activity exactly fifty years after the appearance of the "Recht des Besitzes." He declined to labour any longer with failing vigour on the fields where he had won his fame in the freshness of youth and the ripe strength of manhood. Nor could the seat in the "Herrenhaus" and the "Kronsyndicat," which dignities, with the order of the Black Eagle,† the late king conferred upon him, induce him to resume his part in the work of legislation.

\* Acten der K. Acad. der Wissenschaften Abschn., ii., vi., d. No. 17. Blatt 41, 26 Jan. 1846.

† On the death of Alexander von Humboldt, the present king, then prince regent, bestowed on him the office of Chancellor of the "Friedens-classe" of the Order of Merit.



The record of his declining years contains little but the enumeration of the honours he received from an admiring king and people. Besides those already mentioned, two must not be omitted. At the jubilee of the university which he had tended from its cradle, the rector mentioned him as one still living of the illustrious founders of the institution.

"Only a few days later (31 Oct., 1861), on the second and more singular jubilee of Savigny's doctorate, the sixtieth anniversary, there assembled in the family circle of the elder of his two surviving sons, now Prussian ambassador at Dresden, the delegates of the universities and academies, of the highest tribunals, and even of the royal houses of Germany, around the prince of German jurisprudence. He appeared among the friendly throng with firm bearing, even at such an age a form of manly dignity, with the expression of inward emotion and of calm satisfaction at the quiet but heartfelt sympathy; and he who saw the noble brow, the mild yet spirited eye, the clear profile, forgot that eighty-one years had passed over that thoughtful brow, that still unwhitened hair, and that unbent figure. In a few plain, simply natural, yet affectionate words, he spoke his thanks. I have preserved them as noted down, and impart them as a memorial of that hour. 'In old age,' he said, 'the faculties decay one after another. One remains to me, for which I am thankful. It is love for the many who, in my long professional life, have accompanied me as pupils and friends, some also as comrades in my calling. These I see nobly represented around me, and among them my beloved sons. I thank them for all the love they have shown to me, as well as for the great happiness of this day. I ask them to keep their love for me in the short remaining period of my life.'

"This love," continues his affectionate pupil, "in which the first earnest solemnity of his character had entirely merged, together with the deep inward piety of his heart, bore for him during this brief period the heaviest burden of old age, the clear and quietly expressed consciousness of being compelled to survive, and having survived not only others, but himself."

He died peacefully and hopefully, in October, 1861, survived by his wife, who had been the companion of his long

life and the nurse of his old age; by two of his six children, and by a troop of grandchildren.

In April, 1848, he had given his noble collection of extremely valuable MSS. and printed books to the Royal Library, under reservation of his property. A codicil of 26th May 1852, left it as a bequest to that library under certain conditions. The collection, which is not to be separated, includes forty-four MSS., among others the famous MS. of the West Gothic Laws, unprinted collections of Canons, Burmann's collations of Martial, the letters to Graevius, Leibnitz's Correspondence with Schulenberg, from 1704 to 1713; 178 volumes of the Glossators; 284 editions of Roman law sources, conspicuous among which is the rare Schöffers *Princeps Editio* of the Institutes.

It is left to the determination of Professor Rudorff whether any of his *Adversaria*, or of the notes used for his lectures, should be published. We are led to conclude that it is not probable that any great advantage would accrue to learning from the publication of materials which have already been communicated to the world in another form by Savigny and his pupils, especially as they must now lack the finishing touches of the master's hand. His own desire is not declared; but it is safe to conclude that no wish for personal distinction influenced him in allowing this option. The preface to his *System* nobly expresses the views of a great mind, conscious of the defects of its works, yet not withholding them if they contribute but a mite to the advancement of science.

"Now when a considerable portion lies before me completed, I might wish that much of it had been more exhaustive, plainer, and therefore different. Should such a knowledge paralyze the courage which every extensive enterprise requires? Even along with such a self-consciousness, we may rest satisfied with the reflection that the truth is furthered, not merely as we ourselves know it and utter it, but also by our pointing out and paving the way to it, by our settling the questions and problems on the solution of which all success depends; for we help others to reach the goal which we are

not permitted to attain. Thus, I am now satisfied with the consciousness that this work may contain fruitful seeds of truth, which shall perhaps find in others their full development, and bear rich fruit. If, then, in the presence of this full and rich fructification, the present work, which contained its germ, falls into the background, nay, is forgotten, it matters little. The individual work is as transient as the individual man in his visible form; but imperishable is the thought that ever waxes through the life of individuals—the thought that unites all of us who labour with zeal and love into a greater and enduring community, and in which even the meanest contribution of the individual finds its permanent place.”—(System, vol. i., Vorr. p. l., and comp. vol. viii., Vorr. p. vi.)

Such a passage expresses that conquest of self which his biographer regards as the grand feature of his character, which is singularly prophesied in his family motto, “NON MIHI SED ALIIS,” and which is strenuously taught in his works. It implies not only a command over the passions and desires of the individual, but a victory over all isolation in politics, religion, or science, every particularism or sectarianism that separates a class or a race from the nation, that divides “the sect, the profession, or the age from the higher political, moral, historical, and scientific whole, of which it is a subordinate part.”

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## ART. VII.—CASE OF THE ALABAMA.

1. *Correspondence respecting the Alabama. Presented to both Houses of Parliament, by command of her Majesty. 1863.*
2. *Speech of the Solicitor-General on the case of the Alabama, in the House of Commons, 27th March, 1863. "Times," 28th March, 1863.*
3. *Copy of, or extracts from, the correspondence between the Commissioner of Customs and the Custom-house authorities, at Liverpool, relating to the building, fitting out, and sailing of the vessel, No. 290, since known as the Confederate cruiser Alabama. Ordered by the House of Commons to be printed, 24th March, 1863.*

THE case of the Alabama is sufficiently remarkable, both in its facts and in the arguments to which it has given occasion, to call for a thorough review of both. It may be asserted that, of all recent cases, this is the most likely to take its place as a leading one in the law of nations.

On June 23, 1862, Mr. Adams, the ambassador of the United States in London, addressed to Earl Russell, her Majesty's Secretary of State for Foreign Affairs, a letter in which, after mentioning "the equipment from the port of Liverpool of the gunboat, the Oreto, with intent to make war upon the United States," he says, "I am now under the painful necessity of apprising your lordship that a new and still more powerful war steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dockyard of persons one of whom is now sitting as a member of the House of Commons, and is fitting out for the especial and manifest purpose of carrying on hostilities by sea. . . . I now ask permission to solicit such action as may tend either to stop the projected expedition, or to establish the fact that its purpose is not inimical to the people of the United States." We omit the details which Mr. Adams communicated on this

occasion in support of his statement, since they were not so authenticated that Lord Russell could take upon them any other action than that which he adopted without loss of time, in referring the matter to the Commissioners of Customs for inquiry. But we direct attention to the statement itself, because it expresses clearly the ground taken up by Mr. Adams, and to which he firmly adhered throughout. This is the more necessary on account of the subsequent introduction into the argument, by other parties to it, of the very different topic of passive contraband.

The name of passive contraband, not much known in England, and implying a doctrine little countenanced by English statesmen, has been given to the sale by neutrals, on their own soil, to the agents of a belligerent, of those articles which, if the neutrals transported them by sea to the belligerent, would be articles of contraband properly so called. The name of course implies that the traffic so designated is held to be a breach of the duties of neutrality; but, since it takes place on a neutral soil, a belligerent who should deem himself aggrieved by it would have no means of executing justice on the neutral with his own hand. If the goods are shipped, and he takes them at sea, the neutral suffers no loss, because, from the nature of the case, the goods have already become the property of the enemy. War, then, against the neutral is the only possible remedy of the aggrieved belligerent; and much learning and philosophy have been expended on the question whether a war undertaken for such a cause would be just. Upon that question we shall not spend much time, knowing that for such a cause no recorded war has been undertaken, and believing it to be in the highest degree improbable that any ever should be. If we imagine a neutral country to be so great a mart for arms and munitions of war that either belligerent is essentially aided by purchasing them there, the chance is enormous that the other belligerent will also have resorted to the same source of supply; and although it is not true that a breach of

neutrality is excused by offering similar advantages to both sides impartially, yet it is not very probable that the balance of advantage derived by either will, in the case we have supposed, be so great an inconvenience to the other that, by declaring war against the neutral, he will multiply his enemies in order to get rid of it. Far be it from us to license the indulgence of all unfriendly dispositions which in any particular instance may not be likely to draw down actual vengeance on the misdemeanants. But to assert international duties, the positive enforcement of which is utterly and in every case improbable, is a folly like that of enacting national laws with no sanction of any kind. As such enactments, being surely disobeyed, could only tend to bring all law into contempt, so the denunciation of passive contraband by theorists tends to make neutrals reckless of the duties really incumbent on them. It does even worse than this, for it encourages belligerents to cherish a grudge at being wronged by a traffic which in fact is inevitable, since scarcely even the most despotically governed country could endure so systematic an interference by the authorities with the dealings between individuals within its territory, as would be necessary in order to prohibit it with effect. These considerations must outweigh the importance of rounding off a theory about contraband, of which, since there is no commerce that does not, directly or indirectly, augment the resources of a nation for war, it will never, after all, be possible to give a consistent account, while any intercourse between neutrals and belligerents is permitted.

Mr. Adams, then, took up no ground so weak as that which we have been exposing: his representation was based on the duty of a neutral not to permit the use of his territory as a startingpoint, or base of operations, for a hostile expedition. This duty is clear: to furnish our government with the means of performing it was the main object with which the Foreign Enlistment Act was passed in 1819. But there is a point in its application at which it becomes a matter of

some nicety to distinguish the cases which fall under it from those which belong to the chimerical field of passive contraband. Suppose, for instance, that a single vessel sails from our ports, built and adapted for war alone, and in the actual service of a belligerent government, but wholly unarmed and unprovided with the munitions of war, and having no one on board who was enlisted within our territory into the service of her government: does this vessel constitute in herself a hostile expedition—equally inapt as she is for war and commerce, though, even in her unfurnished state, not absolutely incapable of either? Is there anything more in her case than the sale to a belligerent of a hostile weapon, for such is eminently a ship built for the purposes of war, but a sale effected in a neutral port, and therefore exposing the neutral to no blame, though the purchaser carry off his acquisition and use it to the serious detriment of his adversary? We should have no difficulty in accepting the former alternative, considering the public service and hostile errand on which the vessel quits our shores. And we should claim a strong support for that opinion in the seventh section of the Foreign Enlistment Act, which makes it a misdemeanour to “*fit out or arm*” a vessel, for employment in foreign service, “*as a transport or storeship, or with intent to cruise or commit hostilities,*” against friendly powers; and proceeds to declare the forfeiture of such vessel, and to empower the officers of customs and excise to seize her. Hence it clearly appears that the gist of the offence against the act lies in the public service against alien friends, independently of any armament, and even in spite of proof that the service intended, though hostile, is not that of an armed ship of war. Nor could it be objected that the Foreign Enlistment Act does not declare the law of nations; for its preamble recites that the offences against which it is directed “*may be prejudicial to, and tend to endanger, the peace and welfare of this kingdom,*” which can only be by their giving just ground of complaint to foreign powers.”

But the case we have supposed falls short of that of the Alabama, by wanting the material ingredient of there being men on board enlisted within our territory for the service of the belligerent government; yet we are sorry to say that the argument of the Alabama's case, in the British press and in parliament, has been marked by a laborious attempt to assimilate it to the cases of so-called passive contraband.

The next date of importance in the narrative is July 21, when the United States' consul at Liverpool presented six affidavits to the collector of customs at that port, "requesting me," says the collector, "to seize the gunboat" to which Mr. Adams had referred in his letter of June 23, then known as No. 290, but since as the Alabama. Copies of the same affidavits were received by Lord Russell from Mr. Adams on the following day (July 22), with a report of the consul's application to the collector "to act under the powers conferred by the Enlistment Act." Of this circumstance, and those which followed, the Solicitor-General gave the following account to the House of Commons:—

"It was on the 22nd that he (Mr. Adams) transmitted his first series of depositions; *he did not complete his evidence till the 24th, and the letter in which he sent them was not received till the 26th, so that he did not place the evidence on which he relied in the hands of the government till the 26th of July.* In the meantime he obtained the opinion of the honourable and learned member for Plymouth, who, on the 16th, stated his belief that there was a case of suspicion, but not enough to justify the detention of the vessel. When the evidence was completed, it was laid before the honourable and learned gentleman, who, on the 23rd, thought there was a case sufficient to warrant her detention. Upon that evidence the legal advisers of the government came to the same conclusion as the honourable and learned member. But I wish the House to understand that in those depositions there was a great mass of hearsay evidence, which, taken by itself, could not form the basis of any action. Of the six depositions transmitted on the 22nd of July, only one was good for anything at all, namely the evidence



of a person named Passmore, which was sufficient to prove material facts. Two more were sent, corroborating Passmore, on the 24th, and were received by Earl Russell *on the 26th, Mr. Adams having taken all that time to get his evidence ready.* Now what is the delay of which we are accused? The 26th was Saturday, and the 27th Sunday. *The complete evidence was not in the hands of Earl Russell till the 26th,* and he told Mr. Adams on the 28th, that is on the Monday, that the law officers of the Crown were consulted. He got their opinion on the 29th, and that very same day a telegraphic message was sent down to stop the ship. Really, sir, one is shocked at the perversion of mind which arises under, I admit, the most excusable circumstances; for the House will give me credit for sincerity when I say that no one makes more allowance than I do for the natural feeling of irritation on the part of the American nation. No one can be more anxious than I am that we should stand straight with them, and they with us; but I must say that, but for the perversion of mind consequent on an irritable state of feeling, traceable to causes with which we can sympathise, I cannot conceive how any human being can say that the government have not acted with the promptitude which they ought to have shown."

Three or four times in the above passage, and in as many different ways, does the Solicitor-General impress on the House and the world that Mr. Adams did not, till the 26th, complete his evidence, or get it ready, or place in the hands of the government the evidence on which he relied. We therefore believe that it is our readers who will have their turn of being shocked at the perversion of mind which arises under more or less excusable circumstances, when we tell them that the evidence transmitted by Mr. Adams to Earl Russell on the 22nd was a complete body of evidence; that he relied on it; that he requested her Majesty's government to act on it; that he gave them no hint of any further evidence to come; and that if the government ever received any further evidence from Mr. Adams, it was not because he thought it necessary to his case, but because time had

been given for its transmission by the refusal of the government to act upon the evidence on which they were formally and diplomatically required to act. That our readers may judge for themselves, we will place before them the full text of Mr. Adams's letter of the 22nd to Earl Russell:—

*"Legation of United States, London, July 22, 1862.*

"MY LORD,

"I have the honour to transmit copies of six depositions taken at Liverpool, tending to establish the character and destination of the vessel to which I called your lordship's attention in my note of the 23rd of June last.

"The originals of these papers have already been submitted to the collector of the customs at that port, in accordance with the suggestions made in your lordship's note to me of the 4th of July, as the basis of an application to him to act under the powers conferred by the Enlistment Act. But I feel it to be my duty further to communicate the facts, as there alleged, to her Majesty's government, and to request that such further proceedings may be had as may carry into full effect the determination which I doubt not it ever entertains to prevent, by all lawful means, the fitting out of hostile expeditions against the government of a country with which it is at peace. "I avail, &c.,

"CHARLES FRANCIS ADAMS."

There cannot be a more hopeless contradiction than that which exists between the above letter and the statement that Mr. Adams did not, till the 26th, place in Earl Russell's hands the evidence on which he relied. But in Mr. Adams's letter of the 24th, enclosing the two additional depositions, and Mr. Collier's opinion on the case presented by all the eight affidavits, there does occur an expression which seems to sanction another of the phrases used by the Solicitor-General.

The letter is as follows:—

*"Legation of the United States, London, July 24, 1862.*

"MY LORD,

"In order that I may complete the evidence in the case of the

vessel now fitting out at Liverpool, I have the honour to submit to your lordship's consideration the copies of two more depositions taken respecting that subject.

"In the view which I have taken of this extraordinary proceeding as a violation of the Enlistment Act, I am happy to find myself sustained by the opinion of an eminent lawyer of Great Britain, a copy of which I do myself the honour likewise to submit.

"Renewing, &c.,

"CHARLES FRANCIS ADAMS."

What need was there that evidence should be "completed" on which Mr. Adams already relied? Clearly the completion was necessary to satisfy some other persons, who did not rely on the evidence as it stood before. Who these persons were is shown by the following letter from the Commissioners of Customs to the collector of customs at Liverpool, printed in the second parliamentary paper named at the head of this article, which was not in the hands of members till after the delivery of the Solicitor-General's speech:—

"*London, July 22, 1862.*

"SIR,

"Having considered your report of the 21st inst., No. 1,200, stating, with reference to previous correspondence which has taken place on the subject of a gunboat which is being fitted out by Messrs. Laird, of Birkenhead, that the United States' consul, accompanied by his solicitor, has attended at the customhouse with certain witnesses, whose affidavits you have taken and transmitted for our consideration, and has requested that the vessel may be seized under the provisions of the Foreign Enlistment Act, upon the ground that the evidence adduced affords proof that she is being fitted out for the government of the Confederate States of America:

"We acquaint you that we have communicated with our solicitor on the subject, who has advised us that the evidence submitted is not sufficient to justify any steps being taken against the vessel under either the 6th or 7th sec. of Act 59 Geo. III., cap. 69; and you are to govern yourself accordingly.

"The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would

be liable to pecuniary penalties, for security of which, if recovered, this department might detain the ship until those penalties are satisfied, or good bail given ; but there is not sufficient evidence to require the Customs to prosecute ; it is, however, competent for the United States' consul, or any other person, to do so, at their own risk, if they see fit.

“ T. F. FREMANTLE.

G. C. L. BERKELEY.”

It is true that, in the published documents, there is no other trace that the opinion of the solicitor of the Customs was communicated to Mr. Adams, than that which is furnished by the pregnant phrase, “ in order that I may complete the evidence,” in his letter of the 24th. But, besides that phrase, it is not conceivable that Mr. Adams's letter of the 22nd should have remained altogether without acknowledgment until the 28th, as on the face of the papers it would seem to have done ; and whether or not Mr. Adams received a verbal communication of the opinion, he would at any rate hear it from the United States' consul at Liverpool, to whom its effect, in the refusal to stop the ship, must have been immediately known. Hence, no doubt, it was that he took the opinion of Mr. Collier on the 23rd, and applied the final stimulus to the government by the transmission of that opinion enclosed in his letter of the following day. But, if this be so, Mr. Adams's expression, “ in order that I may complete the evidence,” which, as repeated by the Solicitor-General, must have aided in impressing on the House that he took all the time till the 26th to get ready that “ evidence *on which he relied*,” really conveyed to those who knew the facts the opposite meaning of an attempt to satisfy some who, in Mr. Adams's distinctly expressed judgment, ought to have been satisfied before. However this may be, two things stand out clearly : first, that Mr. Adams did, by the 22nd—even by the 21st, if we take the date of its communication to the collector at Liverpool, who had power to act—“ get ready ” that “ evidence *on which he relied* ;” secondly, that, since a

government opinion was actually given on the 22nd, the only excuse which it remains possible to suggest for not stopping the *Alabama* is that the opinion given on that day was the right one on the evidence as it then stood. To the question whether this was so, we shall now address ourselves.

Now, that question is sufficiently answered by pointing out that the additional affidavits contain no facts of a different description from those deposed to in the former ones. They are the affidavits of a ship-carpenter and a mariner, who had been enlisted for the gunboat by Captain Butcher, her commander, in each case with full notice of her being built for the Confederate government; and, in the case of the mariner, who had told the captain "that he wanted to get South in order to have retaliation of the Northerners for robbing him of his clothes," with an express intimation in reply, "that if he went with him in his vessel he would very shortly have that opportunity." But the seaman Passmore, one of the former deponents, had given still more direct evidence to the same effect.

"Captain Butcher asked me if I knew where the vessel was going; in reply to which I told him I did not rightly understand about it. He then told me the vessel was going out to the government of the Confederate States of America. I asked him if there would be any fighting; to which he replied, 'Yes, they were going to fight for the Southern government.' . . . The said Captain Butcher then engaged me as an able seaman on board the said vessel, at the wages of £4 10s. per month; and it was arranged that I should join the ship in Messrs. Laird and Co.'s yard on the following Monday. To enable me to get on board, Captain Butcher gave me as a password the number 290. . . . There are now about thirty hands on board her, who have been engaged to go out in her. Most of them are men who have previously served on board fighting ships."

Well might the Solicitor-General confess that Passmore's evidence "was sufficient to prove material facts," and that the subsequent depositions merely "corroborated" him. Material, indeed! Why, besides the power which we have already

quoted to seize a ship fitted out for a hostile service against alien friends, the fifth section of the Foreign Enlistment Act, to which the solicitor of the Customs did not refer, gives power to detain any vessel having on board persons enlisted or engaged within the kingdom for foreign military or naval service. Well, too, might so great an advocate feel that when the affidavits and the dates of their receipts were already in the hands of members, a case could only be made out for the government by labouring to show that Mr. Adams had not, on the 22nd, put them under the necessity of saying aye or no, whether they would act on Passmore's evidence. That the law officers should be consulted on the Monday, and that a telegram should be sent on the Tuesday to stop the ship, speaks well for their promptitude, though not better than all who know the Solicitor-General would expect. It is even possible that the defence might have been more candid, had any personal blame been in question. But, however that may be, when the vice of advocacy intrudes itself into questions of state, and especially when the finishing touch of its rhetoric is one of disdainful pity for a great and sensitive nation, with which, in this matter at least, no fault is to be found, it becomes a duty to expose it.

But the Alabama sailed on the eighth morning after the request to detain her was made to the collector at Liverpool, the morning of the day on which a tardy effort was made to prevent the expedition. Now the right of a foreign state, to claim satisfaction for the hostile use of territory professedly friendly, depends in no way on the means of preventing such use which the government of that territory may possess. If the French had seized Antwerp, and were preparing an expedition from it against our shores, we should not refrain from hostilities in the Scheldt, because the kings of the Belgians and the Netherlands might demonstrate their perfect innocence of all complicity. If Canada were invaded by a party coming from the state of New York, our ambassador at Washington would treat with contempt any disquisition on the respective consti-

tutional powers of the federal and state governments. The answer would be: "Of your constitution we know nothing but this, that it points out the authorities at Washington as the only ones to whom we are allowed diplomatic access; to us, therefore, those authorities are answerable for all that takes place within the territories which, towards us, they claim to represent." And as little as foreign states are concerned with the relations between a federal government and the members of the federation, so little [are they concerned with the relations between a government and its individual subjects. Whether the central power be strong or weak, whether the bond of union between the elements of a nation be firm or loose, are questions for itself alone. The united responsibility of the nation to foreigners, for the amicable employment of its territory, is among the first principles of international law. We do not trouble ourselves with thorny questions of Brazilian law, when our citizens, not voluntarily landing in Brazil, but thrown on her coast by the common perils of the sea, receive there a treatment reprobated by the common voice of humanity. If our statute book should contain any provisions going beyond the received law of nations, as if an act should be passed to prohibit any traffic within British territory which is affected by no international doctrine but the chimera of passive contraband, an ambassador who should request our government to enforce it would be bound to accept it such as it might be. But, putting the case of the Alabama on the ground which he most properly took up from the first, Mr. Adams was in no way concerned with any limitations or imperfections of the Foreign Enlistment Act. He might even ignore the question as to what Lord Russell calls "the legal authority of the law officers."\* We, indeed, have made up our minds on that question, and consider that, with the evidence we have quoted in his hands, a Foreign Secretary might, on July 22, 1862, have ventured to decide for himself that a hostile expedition was on the point of departure

\* Letter to Mr. Adams, of January 24, 1863.

from our shores, and that the Foreign Enlistment Act applied to the case. Nay, we will venture to assert that the law officers are not more the constitutional advisers of the Crown in the law of the land, than its responsible ministers are in the law of nations; and that however proper a reference to the former may be on the effect of the Foreign Enlistment Act in a difficult point, or on prize law as actually administered in our Admiralty Court, yet a Chatham or a Canning would have held it his business to instruct the law officers, in case of need, in the duties of neutrality. But we must repeat that our duties to the United States in this matter are quite independent of our statute law and constitutional usage.

Such was the opinion of Mr. Canning, in the debates on the Foreign Enlistment Bill in 1819, and on the motion for the repeal of that law in 1823. He never put it as a boon to Spain; the law was wrung from him by a sense of duty, that the nation might fulfil obligations independently incumbent on her, while his keen sympathy was with the cause of the American colonies, to whose case it was first to apply. We have already seen how carefully the preamble appealed to the same argument, to justify a measure which would otherwise have been too alien to the principles of liberty to receive a moment's consideration from any government we have had since the revolution; and Mr. Canning's own words were these:—

“ I do not now pretend to argue in favour of a system of neutrality; but it being declared that we intend to remain neutral, I call upon the House to abide by that declaration, so long as it shall remain unaltered. No matter what ulterior course we may be inclined to adopt; no matter whether, at some ulterior period, the honour and the interests of this country may force us into a war; still, while we declare ourselves neutral, let us avoid passing the strict line of demarcation. When war comes, if come it must, let us enter into it with all the spirit and energy which become us as a great and independent nation. That period, however, I do not wish to anticipate, much less desire to hasten. If a war must come, let



it come in the shape of satisfaction to be demanded for injuries, of rights to be asserted, of interests to be protected, of treaties to be fulfilled. But, in God's name, let it not come in the paltry, petty-fogging way of fitting out ships in our harbours to cruise for gain.

"At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality as long as we mean to adhere to it, and, by so doing, we shall, in the event of any necessity of abandoning that system, be the better able to enter with effect upon any other course which the policy of this country may require."\*

This was the language of an English statesman, when the struggles were scarcely closed which had made international topics as popular in England as those of free trade have since become. The spirit in which the legislation of that day will now be enforced is a test of the temper which a long peace, at least with all our ancient and most dreaded foes, has engendered. We are bound to say that there is at present no cause to be dissatisfied with that spirit, seeing the activity which, during the last few weeks, has been shown in detaining gun-boats reasonably suspected of being built in contravention of the law. That a most unfortunate slip was made in the case of the *Alabama*, is widely admitted by well informed persons whose speech is not moulded to official accents. But if men in official positions will persevere in falsifying public doctrines in order to cover the consequences of that slip, they must not be allowed to do so without a protest, more especially in these days, in which the study of state papers and parliamentary discussions, as containing the elements of international law, has been so largely developed.

The old furniture of that science consisted mainly in compilations of treaties and the opinions of those who are called jurists, whence the curious result followed, that a writer, while a theorist to his contemporaries, became, almost by the mere fact that he had written, an authority to his successors. This procedure was justified by the plea of collecting testimonies to the consent of mankind, who, or at least the thinking

\* Canning's Speeches, vol. v., pp. 51—2; 8 Hansard, N.S., 1057.

portion of them, were supposed to be governed on the whole by reason. But the criticism of the nineteenth century has detected philosophical partisanship and national prejudice even among the most respected of the elder jurists, and its prolific authorship has farther diminished the authority of writers by increasing the numbers who claim to share it; and since, in truth, it is rather the consent of nations, than of men as individuals, which must decide, there is a still deeper reason why the utterances of private writers, no matter what their wisdom or their fame, cannot be reckoned with those of the statesmen who are specially deputed to manage this portion of the affairs of their respective countries. Especially since the close of the last general war, the cheapness of printing, and modern habits of publicity, have furnished large material for the kind of research which thus begins to distinguish international jurisprudence. Numerous cases which are made the subject of diplomatic correspondence or of debates in public assemblies, but which neither give rise to treaties, nor would have become known in any authentic fashion to the writers of a century ago, are now recorded in the accumulating mass of published state papers. They illustrate international law in its daily working, as the laws of the land are illustrated by the experience of life, and supply that familiar knowledge of the matter with which its rules are concerned, without which he who should address himself to its more difficult questions would resemble a hermit brought from his desert into a strange city, to plead with booklearning a cause that turned on the manners of the place.

Nor need modern statesmen, as a class, fear the results of this publicity. They are not more warped by national interests and antipathies than the private writers of previous ages, who, moreover, were often put forward by their governments as unavowed and irresponsible champions. But as statesmen must now write and speak under a sense that they are furnishing quotations to generations of publicists yet unborn, so those who devote themselves to that line of research

must be impartial, and as little connive at error as they would aid in propagating it. Their rule must be that of Dante:—

“Ma per trattar del ben ch’ivi trovai,  
Dirò dell’ altre cose ch’io v’ho scorte.”

We therefore point out for animadversion the attempt of Earl Russell to treat the case of the Alabama as analogous to “the accidental evasion of a municipal law of the United States by a particular ship;”<sup>\*</sup> and the double error of the Solicitor-General, in saying that “the Foreign Enlistment Act was passed for the defence of our neutrality against any invasion of it by other powers, and not in consequence of any obligation imposed on us;” and in representing the case of the Alabama as one simply of the sale of an instrument of war. The latter assumption runs through his whole speech, and comes to the surface in passages too numerous to cite, but of which the following may be taken as a sample:—“In the present instance, the sale of a vessel of war is an offence purely because our own law has declared it to be so.” In fact, he altogether ignores the question of the hostile use of neutral territory, as the starting point of expeditions, and the base of their operations. So complete a preterition of a point often and clearly put by Mr. Adams, by an advocate whose intelligence never misses the force of an argument, and whose subtlety we never before knew at fault for an answer, is the highest testimony which we could have imagined to the strength of his adversary’s case.

“It is clear,” said Mr. Adams, in his letter to Earl Russell of November 20, 1862, “that the reciprocation of such practices could only lead in the end to the utter subversion of all security to private property upon the ocean. In the case of countries geographically approximated to one another, the preservation of peace between them for any length of time would be rendered by it almost impossible. *It would be, in short, permitting any or all*

<sup>\*</sup> Letter to Mr. Adams, of December 19, 1862, in Correspondence respecting the Alabama, p. 26.

*irresponsible parties to prepare and fit out, in any country, just what armed enterprises against the property of their neighbours they might think fit to devise, without the possibility of recovering a control over their acts the moment after they might succeed in escaping from the particular local jurisdiction into the high seas."*

And again, in his letter to the same minister of December 30, 1862 :—

"The only allegation which I find in your lordship's note in connexion with the United States is this, that vast supplies of arms and warlike stores have been purchased in this country, and have been shipped from British ports to New York for the use of the United States' government. Admitting this statement to be true to its full extent, conceding even the propriety of the application of the term 'vast' to any purchases that have been made for the United States, the whole of it amounts to this, and no more, that arms and warlike stores have been purchased of British subjects by the agents of the government of the United States. It nowhere appears that the action of the British went further than simply to sell their goods for cash. *There has been no attempt whatever to embark in a single undertaking for the assistance of the United States in the war they are carrying on*; no ships of any kind have been constructed or equipped by her Majesty's subjects for the purpose of sustaining their cause, either by lawful or unlawful means, nor a shilling of money, so far as I know, expended with the intent to turn the scale in their favour. Whatever transactions may have taken place have been carried on in the ordinary mode of bargain and sale, without regard to any other consideration than the mere profits of trade. . . . My present object in referring so much at large to these offences is to show the great injustice of your lordship in proceeding to comment upon the action of the respective belligerents as if there was a semblance of similarity between them. So far as the United States are shown to be involved in censure, it is simply by the purchase and export of arms and munitions of war from a neutral—an act which your lordship expressly points out eminent authority to my attention to prove implies no censurable act on either party; whilst, on the other hand, it is American insurgents who find

British allies to build, in this kingdom, and to equip and send forth war-ships to depredate on the commerce of a friendly nation. . . . Surely this is a difference not unworthy of your lordship's deliberate observation."

This was no novel line of argument, and Earl Russell admitted its force. In his letter to Mr. Adams of January 24, 1863, after repeating the attempt to prove that the government had acted with sufficient promptitude, his lordship proceeds thus:—

"As to other points we are nearly agreed, so far as the law of nations is concerned. But with respect to the statement in your letter that large supplies of various kinds have been sent from this country by private speculators for the use of the Confederates, I have to observe that that statement is only a repetition, in detail, of a part of the assertion made in my previous letter of the 19th ultimo, that both parties in the civil war have, to the extent of their wants and means, induced British subjects to violate the Queen's proclamation of the 13th of May, 1861, which forbids her subjects from affording such supplies to either party. It is no doubt true that a neutral may furnish, as a matter of trade, supplies of arms and warlike stores impartially to both belligerents in a war, and it was not on the ground that such acts were at variance with the law of nations that the remark was made in the former note. But the Queen having issued a proclamation forbidding her subjects to afford such supplies to either party in the civil war, her Majesty's government are entitled to complain of both parties for having induced her Majesty's subjects to violate that proclamation; and their complaint applies most to the government of the United States, because it is by that government that by far the greatest amount of such supplies have been ordered and procured."

It is rather strong, because a belligerent does not close his ports against contraband, to refuse to him the common duties of neutrality. And we find it hard to follow Lord Russell's reasoning about the Queen's proclamation. We have always understood that the sovereign of this realm can make nothing illegal by proclamation. So far, then, as the supply of arms and warlike stores to belligerents is not at variance either

with the law of nations or with the statute law of England, a proclamation forbidding it must be a nullity; and it is not respectful to the sovereign to interpret in such a sense any proclamation which may have been issued. If, therefore, his lordship is not devoted to the theory of passive contraband—and the correspondence in this case sufficiently proves that he is not guilty of that heresy—we submit that he ought not to have expounded the Queen's proclamation as forbidding the sale of arms and warlike stores within the limits of her Majesty's dominions.\* It was a desperate effort to cover, by recrimination, an unlucky practical slip, and we are happy to think that it does not interfere with the value of his lordship's recognition of the difference between common purchases in the markets of the world and the hostile use of neutral territory. We therefore leave this case with the confident belief that, memorable as it will remain among the precedents of international law, the sophistry which has been expended on it will not weaken any principle of that important science.

\* The truth about the proclamation is simply this: it commands the Queen's subjects in general terms to observe a strict neutrality, and to abstain from violating either the law of the realm or that of nations; and it warns them of the consequences of certain specified acts, of which the carriage of contraband, but not its sale, is one. This is not what any one would understand from such an account of the proclamation as is given in Lord Russell's statement, that it "forbids the affording supplies." But let the expression pass. In substance, if his lordship refers to the *carriage* of contraband, the result is that, since no belligerent can really be expected to close his ports against that kind of commerce at the moment when he most needs it, any power may free itself from the obligations of neutrality by warning its subjects against the penal consequences of carrying contraband. And, if his lordship refers to the *sale*, then his statement that the proclamation forbids it must rest on the assumption that it is either a violation of neutrality, or of the law of England, or of the law of nations, every one of which things his lordship says repeatedly in this correspondence that it is not. We do not, therefore, positively insist on the suggestion in the text of a disrespectful interpretation of the Queen's proclamation. A theory at least equally plausible is that no intelligible interpretation at all is put on it in that memorable part of the correspondence which begins with the sentence—"With regard to the claim for compensation now put forward by the United States' government, it is, I regret to say, notorious that the Queen's proclamation of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at nought by parties in this country."—*Earl Russell's letter to Mr. Adams of December 19, 1862.*

# ART. VIII.—LORD MACKENZIE ON ROMAN LAW.

*Studies in Roman Law, with comparative Views of the Laws of France, England, and Scotland.* By Lord MACKENZIE, one of the Judges of the Court of Session in Scotland. William Blackwood and Sons, Edinburgh and London. 1862.

IN our last Number we gave a brief notice of this work, and we have since carefully read it. The perusal has fully borne out the impressions we have already indicated; and, without being unnecessarily encomiastic, we hail it as an excellent, and, in many respects, highly serviceable, production for the cause of jurisprudence. And it has come from a somewhat unexpected quarter. These are not the days when people look for anything from our judges beyond the faithful discharge of their important and practical duties; and any public evidence of the exercise by them of other intellectual energies would, in England, we fear, instead of attracting the interest of the people, in all probability beget a suspicion that the judicial office, which allows a studious leisure so unmistakably proved, may not be so laborious or responsible as it is claimed for its high rank and large salary truly to be. And not only so, it might be contended with much plausibility that there was an inappropriateness in a judge,—before whom, in an artificial and complicated society like ours, disputes might come, calling for the novel and unanticipated application of the rules of law,—committing himself (in the hopeless manner a *book* always does) to positive statements of legal opinion which the litigation of his Court may require him to reconsider, to the peril not merely of his scholarly reputation, but even of his judicial impartiality. It certainly would be very disagreeable for a judge to have his own book quoted against him, and it might

even be that his matter-of-fact publisher might not altogether like the result of the incident! Some of their lordships, no doubt, would get over the difficulty jauntily enough; and we have in our eye more than one learned personage whose *nonchalant* ingenuity would not, in the case supposed, readily fail him. On the other hand, the weight of such authorship is naturally greater than would be allowed to the exposition of ordinary and irresponsible members of the profession; and therefore, unless a judge writes not only well, that is, like a scholar and a gentleman, but also with precise accuracy, he may unconsciously involve the community, among whom he proposes his book to circulate, in a certain measure of embarrassment, and even of injury. There are curiously constituted idiosyncrasies who delight in litigation, and who are never happy except when they are in contention with their fellow men. And such disputants nothing can deter or discourage. But the great majority of people are peacefully inclined, and would accept the dictum of a book in preference to the opinion of its judicial author given after much argument and cost.

It is, in truth, not easy to discriminate as to the possible anomalies of judicial authorship, and perhaps it would be better for judges not to write books at all. But there is no reason why, when they do essay such labours, their works should not be fairly considered, and every reasonable testimony borne to their worth. Nor need we speculate on the possibility of a judge writing a bad book, and certainly with Lord Mackenzie's "*Studies*" and "*Comparative Views*" in our hands, we have no difficulty of the kind; and so far from being troubled, in his case, with the fancied embarrassments of such literature, we feel thankful that the duties of a puisne judge in the Court of Session can be so suitably and beneficially relieved. With a due allowance for the natural prevalence throughout its pages of Scotch legal idiom, the work must be regarded by the well-read English lawyer as one of great merit. Its literary



qualities, too, are not inconsiderable, although we believe it is the first attempt of the kind Lord Mackenzie has made.

At the Bar, Mr. Thomas Mackenzie was long known as a hard-working, largely employed, and successful lawyer; and when, towards the latter portion of his forensic experience, his professional industry became tempered with a certain quiet indulgence in party politics, he offended no one, while he commended himself to the notice of his adopted political leaders. His demonstrations, indeed, in this behalf must have been very welcome, for, with the exception of the late Lord-Advocate Rutherford, the Whig Bar of the period was not remarkable in Scotland for its learning or ability. It was not, then, to be wondered that, according to the course of promotion in fashion in that country, Mr. Mackenzie, after passing the bench of the County Court, as Sheriff of Ross and Cromarty, received his silk gown as Solicitor-General, and, with the appointment, his official claim to further elevation—a claim that was ere long recognised by his appointment to the puisne judgeship, which enables him to add the prefix “Lord” to the title-page of his book.

His lordship appears to have applied himself to his self-imposed task with all the calm knowledge and self-possession of the ripe legal scholar, and his measured language is characterised by a directness and simplicity admirably calculated for his purpose. In fact, it is but justice to say that the work throughout bears the most remarkable testimony to the literary refinement induced by the studious examination of legal science. In his preface he tells us that his main object was to exhibit the principles of the Roman law—a study which, he asserts, “has made great progress on the Continent of Europe, and especially in Germany and France;” but he truly observes that,

“In this country we have certainly not kept pace with our continental neighbours, but it is gratifying to observe that a strong desire has been recently manifested in professional circles to raise the standard of legal education by devoting more attention to Roman

law and general jurisprudence. This has led to the establishment of new chairs in some of our Universities, and of readerships by the Inns of Court in London, while it has called forth from English writers a considerable number of works on Roman law of various degrees of merit, but calculated in the whole to enrich our legal literature."

Of his own juridical mission as a writer, he thus speaks:—

"Without trenching on the ground already occupied by these authors, a good elementary book in English is still much wanted, giving a clear, simple, and accurate view of the general principles of the Roman law, with so much of its history as is necessary for a correct knowledge of the system.

"In the present work I have endeavoured to give a concise exposition of the leading doctrines of the Roman law, as it existed when it reached the highest development in the age of Justinian; and great pains have been taken to simplify the subject as much as possible, by a systematic arrangement, by avoiding all abstruse inquiries of an antiquarian character, and by confining myself to such matters as appeared to be useful and instructive.

"At the outset, I have introduced an historical sketch of the sources of the Roman law, and the political changes in the government, from the foundation of Rome to the accession of Justinian; of the legislative works of that Emperor, in the middle of the sixth century, when all the existing laws and imperial constitutions were revised and consolidated; of the fate of Justinian's legislation in the East and West; and, lastly, of the revival of the study of the Roman law in Europe in the twelfth century, and the progress of this department of knowledge from that epoch down to the present time."

The learned lord proceeds to observe:—

"To this exposition, which is my chief design, I have added a subordinate one, by drawing some comparisons, more or less important, between the Roman system and the laws of France, England, and Scotland; and, although these illustrations are imperfect and compressed within narrow limits, it is hoped they will prove more interesting to the general reader than if I had followed the example of many previous writers on Roman law, by entering into

minute technical details regarding ancient institutions and usages, which have little or no bearing on modern jurisprudence."

These quotations from the preface sufficiently explain the character and scope of the work, and were we to add that the design is, for the most part, well executed, we might say enough to induce the profession to give the book a place in their libraries, assuring them that they might with signal benefit and instruction frequently consult its well-considered statements. But it would not be fair to the learned lord or to our readers thus to stop short, and we shall therefore briefly note a few of the numerous points which attracted our attention.

Lord Mackenzie begins with the early condition of jurisprudence among the Romans, and it might, perhaps, be said that he only wants the upper portion of the fresco in Lincoln's Inn Hall to reach the Mosaic primæval! And the works he has laid under contribution show, at least, great reading; and it increases our value of his labours thus to know that his own work, as the generic result, has been composed after the anxious study of the writings of so many others. He gives a list of about 120 authors, and they are, with one or two exceptions, worthy of all respect at the hands of any professor of the law. But we do not approve of "Compendiums," "Translations," and the like, as authorities to be made use of by a judge. The authorities, however, that he has consulted on the Roman law appear to have been well selected, and with the light they gave him, he considered that system under three periods, all distinguished, as he tells us, by important changes in the political constitution of Rome. 1st. From the foundation of the city to the promulgation of the Twelve Tables, extending over a period of about 300 years; 2nd. From the Twelve Tables to the establishment of the empire under Augustus, in the year 722, after the foundation of Rome; 3rd. From the time of Augustus to the accession of Justinian, A.D. 527.

With the exception of fragments and traditions respecting

it, the law of the Twelve Tables has been lost; but Lord Mackenzie notices a few of those of its regulations which are known, such as the following:—"Insolvent debtors were treated with great severity. They were liable to be seized and imprisoned by their creditors, and after being kept loaded in chains for sixty days, might be sold into foreign slavery." The law of torts was not more liberal, for it was enacted that, "in bodily injuries the barbarous principle of retaliation was followed—an eye for an eye, a limb for a limb." As for the law of libel, how would journals and newspapers of the present day like the following regulation:—"Any one who wrote lampoons or libels on his neighbours was liable to be deprived of civil rights." But these, though very rude and coarse beginnings, contain a sufficiently enlightened recognition of the elements of jurisprudence on the subjects referred to.

Lord Mackenzie is of opinion that the scientific elaboration of law did not commence until the age of Cicero; and, in exhibiting the process of development which was applied to jurisprudence, our author justly pays a tribute to the system which, notwithstanding the wickedness and incapacity of the actual rulers, produced good and wise laws. He says: "Some constitutions by the worst Emperors, such as Nero, Domitian, Commodus, and Caracalla, are remarkable for their prudence and wisdom, which is to be attributed solely to the laudable custom of making laws with the advice of the most famous civilians in the council of State." Perhaps, however, a not less remarkable, though it be a negative, testimony to jurisprudence, is suggested by the learned author's notice of a period when other influences of an adversé and corrupting character prevailed. And more than one of the present powers of the earth, Transatlantic not less than European, might read a lesson in the following:—

"After the death of Alexander Severus, A.D. 235, the Roman Empire, formerly so powerful, but already much enfeebled, showed manifest symptoms of rapid decay. . . . Government was transformed into a military despotism; confusion and anarchy pre-

vailed everywhere ; property was not secure, and life was of no value. Amid the distractions of the succeeding times, jurisprudence, like every other branch of knowledge, declined, and the organization of Roman government being left to depend on the accidental character of one man, could never be relied on, even to secure the first necessities of civilised life."

The authority of law, however, subsequently recovered itself, particularly after the introduction of Christianity, and its development as a social principle in Roman life. The account given of the important and interesting discovery of the institutes of Gaius ought not to be passed over. Respecting it, Lord Mackenzie observes :—

"For a long time this work was only known to us from an imperfect epitome in the *breviarium* of Alaric. But in 1816, Niebuhr found in the library of Verona a palimpsest, which contained the epistles of St. Jerome, and beneath the writing he discovered the manuscript of Gaius. His discovery was verified by Savigny, and the care of deciphering the palimpsest was entrusted to Professor Göschein, of Berlin, who was assisted by Becker and Holweg. These institutes of Gaius, which were published under the title of '*Gaii Institutionum Commentarii IV.*,' are of inestimable value in what may be termed the classical study of the Roman law. They have thrown new light on some important branches of law previously involved in much obscurity, and particularly on the forms of judicial procedure, and they are of immense use in explaining and illustrating the institutes of Justinian, which are mainly founded on this long-lost work of Gaius."

The great era of law reform in Rome was the reign of Justinian, extending from A.D. 527 to 565, being a period of 38 years. Lord Mackenzie quotes Gibbon, who, in his 44th chapter, tells us that "in the space of ten centuries the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase, and no capacity could digest. Books could not easily be found, and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion." We in England are not in so bad

a case as this, for, although by no figure of speech could the term "riches" be applied to our legal literature, we are not certainly without books. We have not hitherto had, however, the guidance of that legal instinct, nor the happy power of applying the necessary remedy, by which the Romans benefited. But an able and philosophic lawyer is at present on the Woolsack, and it would still be no mean advantage to our system if Lord Chancellor Westbury could follow the Emperor Justinian in his amendment of the law. Various commissions, consisting exclusively of juris consults, were appointed, and the ultimate result of their labours was the Digest, or Pandects, which we are told was published on the 16th December, 533, and declared to have the force of law from the 30th of that month. The fullest powers were given to the commission which produced this great work to select only what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and to make such alterations and corrections in the original works as they might think expedient, and the commission was allowed ten years to complete the undertaking—a period certainly not too long when we remember what Gibbon has before told us. But such was the vigorous industry with which they applied themselves to the work, that they completed it in three years! When or where shall we find parliamentary or royal commissions who will so exert themselves? But this is touching on too delicate and irritating a subject.

Lord Mackenzie combats the popular story respecting the supposed discovery of the Pandects at Amalfi in 1135, justly remarking that the Roman law never at any period was wholly unknown, or had lost its authority; and that the works of Justinian, and particularly the Pandects, were known and studied in different parts of Europe long before the siege of Amalfi; and he states that Peter of Valence, in a law book published by him in the 11th century, made use of the Institutes, the Pandects, and the Code, and translations of the Novels by Julian.

The learned lord devotes some interesting pages to the

subject of the revival of Roman law in Europe; in which he pays a well-merited tribute to Pothier, and, through that fine jurist, to the French School of law of which he was so great an ornament. He laments the short-comings of "Britain" as a contributor to the study, but makes no exception from this confession for his own country, although the law of Scotland is founded on the Roman jurisprudence, and the Scotch lawyers are generally understood to be more or less acquainted with it,—and an exception which, if made, his own work would go far to favour. But in the comparatively modern historical school of Germany, he finds a fitting subject of eulogy. "Facts," says Lord Mackenzie, "formerly unknown, have been revealed; ancient errors traditionally received have been exploded; and Roman law, as a science, has in many respects assumed a new aspect," mentioning the well-known names of Hugo, Haubold, Thibaut, Niebuhr, and Savigny, as writers who have given a wonderful impulse to such researches. We cannot allow the name of Savigny to pass without expressing our satisfaction at a proposal which has emanated from the Law Amendment Society, to co-operate with the effort now being made at Berlin, and indeed generally throughout the Continent, to record and perpetuate, by some public testimony, the reputation and memory of that profound lawyer. Perhaps the most fitting way to accomplish this happily conceived project is by the establishment, as is proposed, of a Foundation for encouraging the study of Comparative Jurisprudence.

The following quotation will be sympathised with by all who understand and value the true character and value of our learned profession, and it is a real pleasure to be able to connect such sentiments with the venerated name of Chief Justice Tindal:—

"The Roman law not only possesses a universal scientific value which it can never lose, but preserves also indirectly a practical value in this sense, that it forms the basis of the new civil codes of different states, besides furnishing an inexhaustible store of general principles for the decision of questions constantly occurring

in daily practice, which are not settled by statute, precedent, or usage. In giving judgment in *Acton v. Blundell*, Chief Justice Tindal observed: 'The Roman law forms no rule binding in itself on the subject of those realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe.'

As introductory to his comparative exposition of the laws of France, England, and Scotland, the learned lord gives us an admirable "Preliminary Chapter on Jurisprudence and the Principal Divisions of Law," in which he defines jurisprudence, justice, natural and legal, the relations of positive law and morality, the principal divisions of law, the vexed subject of natural law, positive law, pointing out the imperfections in all legal systems, against which he tells us "there is no appeal, except to the conscience. And here we are reminded of the three general precepts mentioned by Justinian, to live uprightly, to hurt nobody, and to render to every one his due. These maxims breathe a fine spirit of morality, and are evidently for the common advantage of men in their social relations; yet, with all their excellence, they fall greatly short of the golden rule of the Gospel—'All things whatsoever ye would that men should do to you, do ye even so to them.'—Matt. vii. 12."

The learned author does not in so many words state it, but he speaks in such terms of our division into law and equity as to leave no doubt that, in his mind, that double form of administration is a very serious imperfection in our English system. He says: "The division of the two jurisdictions proceeds on no very intelligible grounds, and leads to many anomalies;" and, while admitting the improvements of recent legislation, by which the two departments are brought nearer each other, he observes: "But, notwithstanding these improvements, many



evils still attend this double system of judicature, which occasion great expense and delay to litigants, who are frequently obliged to appeal to two tribunals to obtain redress for a single wrong, or to settle one and the same dispute. In Scotland, there is no division in its courts of law and equity, both these jurisdictions being combined and exercised by the same courts, according to the system which is understood to be universal on the Continent of Europe."

We fear it may be long before a change in our English views in this behalf will take place. Practically regarded, the subject is full of difficulties, and it would require even a more powerful engine than even this work of Lord Mackenzie's to hammer his idea into our stubborn English natures. Some are of opinion that, by judicious legislation having the object in view, a change might gradually come over the habits and opinions of the profession in this country, so that in course of time the fusion of law and equity would work itself out. But this we very much doubt. We are rather of an opinion expressed in a paper read before the Law Amendment Society, about a year ago, by Mr. Robert Stuart, who considered that the change would have to be compulsory, if at all. In that paper Mr. Stuart observes:—

"The existing practice at law is too bald and bare for the purposes of equity; and there is still to be discovered in it a devotion to its darling idea of developing the issue to be tried, whether in law or in fact, in a simple and single form which, in nine cases out of ten, I believe to be incompatible with the purposes of justice. A compulsory change in this respect, therefore, I believe to be necessary, and that if the common law courts are to have given them an equitable jurisdiction, co-ordinate and concurrent with the Court of Chancery, they must be more largely and liberally provided with the necessary expedients than at present. But all this might easily be regulated; and truly, as I have said, the whole question is one of *procedure*, particularly of PLEADING. It is *there*, in the pleading, that the fusion is to be worked out, if it is to be worked out at all; and I venture to suggest that this Society would be well employed in directing its attention to this, the practical and inevitable cha-

racter and tendency of the movement. The Bill in Equity, and the Declaration at Law, must be melted down and fused into one distinct statement, and that this will require the greatest care and nicest discrimination is obvious. But that such a thing may be successfully accomplished, I see no reason to doubt, and accomplished, too, simply by the adaptation of the existing forms." \*

A very able exposition of the doctrines of international law concludes this excellent chapter.

The remaining portion of Lord Mackenzie's book, and by far the larger part of it, although subordinate, as he himself tells us, to its general design, is occupied with his statement of the laws of France, England, and Scotland, viewed comparatively with those of Rome, which we need not say would afford ample materials for lengthened observations; but our space will not admit of any prolonged notice of what, after all, is merely a condensed and well-expressed exposition of what must be, more or less, familiar to our professional readers. We will therefore only note one or two particulars. And, in passing along, our eye has caught the following definition of slavery, taken from the Pandects: "*Constitutio juris gentium quæ quis dominio alieno contra naturam subijcitur*" (D. l. 5, 4, I. 1, 3, 2)—a definition which, without expressing any warlike devotion to the Federal cause in America, we recommend to the Confederates. On the subject of the law of marriage, Lord Mackenzie shows that the Roman law prohibited marriage with a deceased wife's sister. He says: "Under Constantine, who abrogated the ancient law, marriage was prohibited with the widow of a deceased brother, and the sister of a deceased wife." He here refers to the Theodosian code. But what will Lord Shaftesbury and Exeter Hall say, when, in stating the English law of marriage, Lord Mackenzie reminds us that the *Council of Trent* has, to this day, left its mark on the Church of England! We hear it often argued by sticklers for the essential catholicity of our church, as distinguished

\* Law and Equity—The difficulties and prospects of their fusion, pp. 19, 20.

from that of Rome, that, because the English church had no bishops to represent her at the Council, the decrees of the latter were never binding on us. The learned author, however, cites the judgment of the House of Lords in the case of *The Queen v. Millis*, in 1844, to show that after the Decree of the Council of Trent, the ecclesiastical law of England required the presence of a clergyman at a marriage; contrary to the opinion of Lord Stowell, who, in the Dalrymple case, laid it down that prior to the Marriage Act of George II., the law of England, as the Scotch law does at the present day, allowed marriage by words of present consent, without the presence of a clergyman or any religious ceremony. But on the law of marriage in Scotland we need not here dwell; we all know it, and regret its condition. We sincerely hope that the Yelverton case will be the last of its *causes célèbres*. We have indeed heard with much satisfaction that the judgment of the House of Lords in that case is to be followed by a Royal Commission to inquire into the law of marriage in the three kingdoms, with a view to its assimilation. We are glad to observe that this assimilation has, to a great extent, been already accomplished in regard to the property of the wife, and some matters of procedure in suits of divorce. This has been done by an Act passed in 1861, the 24 & 25 Vict., c. 86 (erroneously given by Lord Mackenzie's printer as c. 84), which applies to Scotland many of the provisions contained in the previous English Acts of the 20 & 21 Vict., c. 57, and the 21 & 22 Vict., c. 108, and we hope that, on this account, married women in Scotland will experience no inconvenience, as Lord Mackenzie's readers might imagine they would, for he concludes his interesting chapter on this subject with the following expression of his opinion:—

“ Though recent legislation has materially improved the position of wives, it must still be acknowledged that much remains to be done to soften the rigour of the common law as to conjugal relations in both ends of the island, and *more particularly in England*.”

We feel tempted still further to engage attention to the

contents of this carefully-written work, and we could, indeed, with pleasure find our way quietly through its pages, but our space will not admit of any lengthened review of many of the chapters which follow those we have noticed. For this we may have other opportunities, when we discuss, as we hope to do, those legal reforms and amendments which are needed for a substantial assimilation of the general law of the United Kingdom, the want of which is, we may say, daily felt to be not only an evil in itself, but practically a great social and commercial inconvenience.

For the present we content ourselves with recommending those who desire to make themselves acquainted with the Roman, French, English, and Scottish law, on the subject to which we have referred, and many others—such as Guardianship; Law of Corporations; Law of Property; Law of Prescription or Limitation; the Law of Obligations and Contract; the Law of Succession and Inheritance; the Law of Actions, and suits, and procedure in General—to consult the learned lord's book, assuring them, that whatever their professional experience and learning, they will not only find themselves interested but instructed, and thereby better and wiser lawyers than they were before. As we have before observed, there is an air of remarkable simplicity and plainness in Lord Mackenzie's style, which, to the superficial reader, might seem to be the perfunctory exercise of the careless and over-confident writer; but the discriminating student will, after the thoughtful perusal of what is to be found in this work, be enabled to appreciate that which we have called simplicity and plainness, but which is truly the clear and condensed expression of the most conscientiously elaborated learning.

We are unwilling, however, to conclude this article, without noticing Lord Mackenzie's last chapter on the Roman Bar, in which, having regard to the present condition of the profession in this country, there are some very suggestive observations.

It would appear that, according to the original Roman idea,

there was no "remuneration:" that is, in plain terms, no fees were allowed to counsel. But "after the ancient institutions were modified, and law became a complicated and difficult science, presents of various kinds were given by clients to those persons who devoted themselves to pleading. This practice having been regarded as an abuse, a law was passed by the Tribune Cincius, B.C. 204, prohibiting any one from taking money or gifts for pleading causes; but as this law imposed no penalty on those who contravened its injunctions, it was little observed, and the opinion gained ground that advocates, who required to devote their time to the special studies of their profession, were entitled to receive some recompense for their services."

It is certainly not a little amusing to observe the quiet and rather sly way in which the learned lord speaks of "the opinion gaining ground," that men who have to keep body and soul together, and move in the society of gentlemen, and be gentlemen themselves, should be "remunerated" for their services in a profession to which they devote all their time! The opinion, in fact, gained ground considerably, and the fees became excessive. Lord Mackenzie's remarks on this subject are so interesting that we must give another quotation. He says:—

"Before the overthrow of the Republic it was quite common to give large fees to advocates. M. Licinius Crassus, whose fortune is said to have exceeded three millions sterling, exacted exorbitant sums from his clients, and the same charge has been made against P. Clodius and C. Curio. Cicero himself, who lost no opportunity of boasting of his respect for the Cincian law, and who is represented by his enthusiastic admirers as a model of disinterestedness, is strongly suspected of not having always put in practice the principles which he professed. There are many reasons for believing that the sum of a million of sesterces (about £8,000), which he received from Publius Sylla, then under impeachment, and which was employed by Cicero in the purchase of a house, was neither more nor less than the fee given for his forensic services, though it was

disguised, according to common practice, under the form of a secret loan. Another mode of rewarding members of the bar was by legacies left to them by clients in their testaments. These bequests were considered honourable when they were not obtained by fraud or under influence, and Cicero boasted that he had received in this form sums amounting to upwards of twenty millions of sesterces, equal to about £166,666."

The Emperor Augustus tried to put a stop to all this by a *senatus consultum*, which revived the ancient discipline, and which actually declared that advocates convicted of having received remuneration from their clients, should be compelled to *refund* the amount *fourfold*! It is of course not surprising that this extravagant regulation utterly failed.

The practice of giving fees prevailed, and was at length admitted as a *right*, which, by the way, if we rightly understand the judgment in *Kennedy v. Broun*, it is not in this country. The *honorarium* is not a right, but a mere sanction to accept and retain a fee when given; and we cannot bring ourselves to see that this is a satisfactory state of things for the English Bar. According to the information we have received, it is not only eminently unsatisfactory and practically inconvenient, but it is fraught with the most injurious consequences to the best interests of the public. The Common Pleas, in *Kennedy v. Broun*, took too much for granted, and the learned judgment of the Chief Justice put himself and his court very much in the position of extolling a theory at the expense of the fact. The truth is, that unless a change takes place by the actual adoption of the only practice that is consistent with Chief Justice Erle's theory, the system will prove too much for the working men of the profession, and, if it be carried much further in the present direction, it may destroy the Bar altogether. As it is, its effect is exceedingly discouraging and depressing. Barristers are often observed to be not so anxious for business as might be expected, and the "briefless barrister" may even cease to be a term of reproach.

Lord Mackenzie gives an account of the course of study for,

and the mode of admission to, the Roman Bar, and he winds up with a quotation from the dialogue of M. Loisel, an eminent advocate of the parliament of Paris, in the 16th century. M. Pasquier, who takes part in the discussion, sums up his ideas of what the barrister should be in these words:—

“In short, I desire in my advocate the contrary of what Cicero requires in his orator, which is eloquence in the first place, and then some knowledge of law; for I declare, on the contrary, that an advocate should above all be learned in law and practice, and moderately eloquent—more a dialectician than a rhetorician, and more a man of business and judgment than of great or long discourse.”

We quite agree with Lord Mackenzie that, “There is much good sense in these reflections; and after the lapse of three centuries they apply with equal force to the business of an advocate in our day.” And we recommend them to the particular attention of the Bar generally, in the United Kingdom.

We now bid goodbye to our learned Lord of Session, thanking him for his book, and congratulating the profession and the British community on there being so enlightened a jurist among Her Majesty’s judges.

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## ART. IX.—JUDICIAL STATISTICS, 1861.—ENGLAND AND WALES.

### PART I.—*Police—Criminal Proceedings—Prisons.*\*

WE are now so familiar with the annual issue of the judicial statistics that we almost fail to appreciate their full value. A perusal of this national ledger, or, rather of the report attached thereto, will, however, be always sure to evoke interest in its records. To Lord Brougham, we may observe, are we indebted for this as we are likewise for so many other amendments in our legal system. From 1839 the criminal tables given by the Home Office, owing probably to an

\* Part II.—Common Law—Equity—Civil and Canon Law—will appear in our next.

injudicious parsimony, began to deteriorate, and the items relating to the description of the offenders one by one disappeared. Since 1855, however, we have had annual issues of judicial statistics, not much differing in point of merit from the blue book now before us. This sudden development of so valuable a legal and social machine is mainly attributable to the judgment and experience of Mr. Redgrave, who had had long previous experience in criminal and police matters. The much discussed question of home or foreign penal servitude places the importance of judicial statistics in a clear light. The logic of facts can be now brought readily to bear upon this question by all, who, if no statistics were available to them, would be in a great measure in the hands of theorists not less bold than visionary. Happily, however, we now have an armoury not equally open to all disputants, but only to those who rely on facts and truth. From the regular publication of these statistics we confidently predict the happiest results both to legal and social science.

The judicial statistics for the year 1862 are, like those for the preceding years, divided into two parts, the first relating to criminal, the second to civil matters. We shall select for our record or comments the more important returns found in each part. The first division of this very interesting blue book comprises an account of the police establishments; of the criminal proceedings that took place during the year 1861; and of the state of the prisons during the same period. We thus obtain a succinct view of the means we use for the prevention, investigation, and punishment of crime. Under the head of "prisons" is given a description of the prisoners, their age, occupation, state of instruction, sex, and birthplace, so as to supply us with the most valuable information as regards not only the punishment but also the prevention of crime.

The tables of Part I. thus reflect the felons' progress in all its stages, while they also afford data for discovering the laws which preside over the apparent growth or decay of crime. An alteration has been made in compiling the



data for Part I. for the past year with respect to the definition of "known thieves." This denomination is not in the present returns applied to those who have abandoned their evil courses. The statistics are, as usual, prefaced by an explanatory report, which contains the *crème de la crème* of the matter found in the succeeding tables, a reference to which, however, cannot be dispensed with by those who may wish to obtain complete information concerning any particular items of the statistics.

The total number of the police force on the 29th September, 1861, was 21,413, being an increase on the number for 1859, which was 20,597, which again was a small increase beyond the number for 1850. The number of special constables in the twelve months was 288, and of detective officers 155. This total increase of 663, or 3·1 per cent. beyond the returns for 1860, was made up as follows, viz., in head constables of boroughs an increase of 9; in superintendents, of 11; in inspectors, of 7; in sergeants, of 106; in constables, of 645, or 3·8 per cent. There was, on the other hand, a decrease of 120 in the number of special constables, and of 5 in the number of detective officers, as compared with the returns for 1860. In the metropolitan police, likewise, there has been a decrease of 131 from the returns of the preceding year. The number of the City of London force has been the same for both years.

In the counties and larger boroughs, as a general rule, the police are described to be in a high state of efficiency. Some of the smaller boroughs, however, probably through a perverse adherence to primitive customs, and a supposed regard to their independence, have omitted to amalgamate their police establishments with those of the surrounding counties, and are, consequently, in their police behind the average state of efficiency.

The force for the discharge of the general duties of the counties and boroughs, including the metropolitan districts, and excepting only the business of the dockyards, is reduced

at present to 20,750 men. This number gives, according to the recent census, one constable for every 966 of the total population. In the following localities the number of police in proportion to the population, as calculated on the last census, varies as follows:—In the City of London (a case, however, which is stated to be almost exceptional, and where since the last census a decrease appears in the resident population amounting to 15,622, or 12·2 per cent.), the police are in the proportion of 1 to 178; in the metropolitan police district they are 1 to 504; for the town and port of Liverpool they are 1 to 442; in Bristol, 1 to 510; in Manchester, 1 to 515; in Birmingham, 1 to 785; in Leeds, 1 to 908; in Brighton, 1 to 936; in Berks, 1 to 1,101; while in Rutland the proportion is only 1 to 4,371. To what the varying proportions of police to population indicated by the foregoing returns are to be mainly ascribed is an interesting social question. Assuming that the efficiency of the force does not vary much in the different districts, why is one policeman in Rutland equivalent to four in Berkshire? In fact, statistics cannot suggest an answer to every social anomaly. The habits of a population are as important as their numbers, in respect of the amount of police force necessary to protect the districts. And even where a force is insufficient, yet, if it have been long so, it is usually overworked, so as to meet the requirements of the neighbourhood.

The expenses of the police establishments consisted of the following items:—

	£	s.	d.
Salaries and pay . . . . .	1,178,736	10	3
Allowances and contingent expenses . . . . .	37,619	11	0
Clothing and accoutrements . . . . .	115,933	14	1
Superannuations and gratuities . . . . .	70,737	16	4
Horses, harness, forage, &c. . . . .	32,064	0	11
Station-house charges, printing, stationery, &c. . . . .	124,454	2	5
Other miscellaneous charges . . . . .	19,677	0	8
Total costs . . . . .	£1,579,222	15	8

The total costs of the police for the year 1861 was £1,579,222 15s. 8d. This was an increase over the cost of the preceding year of £48,111 10s. 1d. The largest increase is under the head of "Salaries and pay," which amounted to £57,929 1s. 3d., or upwards of 5 per cent. on the total under this head. In the item of "Allowances and contingent expenses" alone there was an increase of £2,051 9s. 8d., or upwards of 5 per cent. on the total of the same head. In "Superannuations and gratuities" there is an increase of £6,033 3s. 2d., or upwards of 9 per cent. on the total. There was a decrease under all the other heads of expenditure for the year 1861. The average cost per man for the total number of police for 1861 (the basis of calculation being founded upon the whole costs of the establishments), was £73 15s. 0d.; the average for clothing and accoutrements, £5 8s. 3d. These averages were respectively £73 15s. 0d., £53 19s. 9d., and £5 15s. 10d. per man in 1860, and £72 2s. 0d., £53 13s. 0d., and £5 1s. 0d. per man in 1859. The charge for each class of police in the year 1861, and the amounts contributed from the public revenue for the several police establishments were as follows:—

	Total charge.			Contributed from the public revenue.		
	£	s.	d.	£	s.	d.
Borough police .	391,799	15	7	79,861	12	11
County constabulary	614,593	5	4	118,541	8	7
Metropolitan police .	481,302	11	9	141,903	5	5
Her Majesty's dock- yards police .	41,864	6	8	41,864	6	8
City of London police	49,662	16	4			
	£1,579,222	15	8	£382,170	13	7

Three-fourths of the charges for pay and clothing are borne by local funds; the remaining fourth, upon report of efficiency by an inspector of constabulary, is advanced out of the public revenue. But all payments for allowances, horses, &c., are drawn from local funds.

The increase of the cost of the borough police amounted to £7,911 4s. 8d., or upwards 2 per cent. The increase in the amount derived from the public revenue for this branch of the force amounted to £870 6s. 8d. This increase of cost may account for the retention by the force of their efficiency, notwithstanding a reduction of their numbers. For the county constabulary the increase of expense amounted to £9,364 16s. 10d., or upwards of 1·5 per cent. For the metropolitan police there was an increase of £28,944 16s. 5d., or nearly 6 per cent. over the returns for 1860. In the expense of the City of London police there was an increase of £1,890 12s. 2d., or nearly 4 per cent. The increase on the total amount contributed from the public revenue for the police establishments in 1861 over the similar returns for the preceding year amounted to £54,676 19s. 10d., or upwards of 16 per cent. The average cost for each man of the borough police was £63 17s. 6d.; of the county constabulary, £78 10s.; of the metropolitan police, £78 3s. 2d.; of the dockyard force, £63 2s. 10d.; and of the City of London police, £79 1s. 7d. It is obvious that a single and uniform system of police establishments ought to be adopted throughout the whole country, and as well amongst the large as the small boroughs. The local authorities ought not to have any control in this matter, as there is always on the part of ratepayers less reluctance to risk a contingent danger in the shape of an increase of crime, than to prevent such a result by an increase of local expenditure.

There is no reason to doubt the general accuracy of the returns of crime furnished by the police. They have an interest in not returning lower numbers than the facts warrant, and the possibility of exaggeration by them is almost precluded by the stigma which undetected crime would cast upon their vigilance, as also by the existence of the judicial records, which these returns are either connected with or directly extracted from.

The change in the definition of "known thieves," adopted by

the police for the present returns (already noticed by us), accounts for the great decrease of 21·3 per cent. in the number of this class for 1861, as compared with those for the preceding year. There is also for the year 1861 a decrease of 14·9 per cent. in the number of receivers of stolen goods, and of 3·5 per cent. in that of suspected persons, as compared with the corresponding returns for the preceding twelvemonth. This difference may also be accounted for by the change of definition mentioned.

In the number of prostitutes and of vagrants and tramps, both juveniles and adults, there has been during the past year an increase of 2·9 per cent. for the former, and 2·2 per cent. for the latter. In the total number of all the classes of this description under sixteen years of age, there is a decrease of 587 or about 3·4 per cent. from the corresponding returns for 1860. The general total of all these classes, irrespective of ages, shows a decrease of 7·975, or about 6·1 per cent. The numbers for the four years to which the returns extend are shown in the annexed table.

CLASSES.	1861.			1860.			1859.			1858.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
Known Thieves and Depredators :—												
Under 16 years of age .....	3,325	1,307	4,632	4,208	1,467	5,495	4,332	1,546	5,938	4,773	1,608	6,381
Sixteen years and above .....	19,215	6,059	25,274	25,407	7,012	32,419	26,478	7,132	33,610	26,772	6,879	33,651
Receivers of Stolen Goods :—												
Under 16 years of age .....	46	20	66	48	23	71	85	28	113	119	29	148
Sixteen years and above .....	2,979	731	3,710	3,520	849	4,369	3,450	844	4,294	3,410	787	4,197
Suspected Persons :—												
Under 16 years of age .....	3,261	1,117	4,378	3,473	1,130	4,603	3,878	1,370	5,248	3,912	1,512	5,424
Sixteen years and above .....	24,226	5,362	29,588	25,238	5,365	30,603	26,706	5,794	32,440	28,028	5,774	33,802
Vagrants and Tramps :—												
Under 16 years of age .....	3,331	2,351	5,682	2,968	2,163	5,131	3,279	2,167	5,446	3,265	1,942	5,207
Sixteen years and above .....	12,203	6,116	18,319	11,639	5,894	17,533	11,811	6,096	17,907	11,380	5,862	17,352
Total :—												
Under 16 years of age .....	9,963	4,695	14,658	10,517	4,783	15,300	11,624	5,111	16,735	12,069	5,091	17,160
Sixteen years and above .....	24,623	18,378	76,891	65,904	19,120	84,924	68,445	19,808	88,251	69,600	19,403	89,002

In the metropolis and the other towns grouped together in the statistics of former years, for the purpose of showing the proportion borne by the criminal classes to the whole population in each group, an increase of population has according to the last census taken place, amounting altogether to 20 per cent. over the returns of the census of 1851. There has been, nevertheless, in the same towns a decrease of 1·3 per cent. in the number of the criminal classes in 1861, as compared with the corresponding returns for 1860, while there has been an increase of prostitutes amounting to 2·5 per cent. in the same places. There was, however, in the same districts a decrease of 7·8 per cent. in the number of the criminal classes, and of 2·5 per cent. in the number of prostitutes, taken separately, in 1860, as compared with 1859. The calculations made in preceding years having been based on the census of 1851, the report contains no comparison of the proportionate number for 1861, calculated on the census of that year, with the returns of the preceding years. This course, however, if persevered in generally, will deprive the statistics of much of their real value. In the metropolis the proportion of the criminal classes to the whole population is as 1 in 231·3; in the pleasure towns, such as Brighton, Bath, &c., charged doubtless with the vices of other districts, the proportion is 1 in 96·5; in the towns depending upon agricultural districts, 1 in 108·5; in the commercial ports, 1 in 120·4; in the seats of the cotton and linen manufacture, 1 in 152·5; in the seats of the woollen and worsted manufacture, 1 in 129·1; in the seats of the small and mixed textile fabrics, 1 in 157·8; and in the seats of the hardware manufacture it is 1 in 98·6. The diversity in the foregoing proportions suggests some interesting inquiries. Why do the criminal classes abound most in the districts of the hardware manufacture (the pleasure towns we consider exceptional), and least in the metropolis and in the seats of the cotton and of the mixed textile fabrics? With regard to the metropolis, although the more serious description of personal outrages has recently greatly increased in it, yet

we can find in its immense demand for labour, the great tide of population that flows in all the leading streets, and the organization of the police, a tolerably satisfactory explanation for the very high place which London and its environs take in the foregoing list. But why do Birmingham and Manchester differ so much in the number of their respective criminals? The cotton manufacture, no doubt, gives employment to all the members, juvenile as well as adults, of a family, while the hardware manufacture is mainly conducted by adults. Yet these discrepancies of commercial condition can hardly account for the great difference in the number of criminals in both places. We leave the problem to the social reformer, for we see no distinct explanation of it. As a set off, however, to the comparative freedom from petty crimes enjoyed by Manchester, we may here observe that we find in a subsequent part of the report that the more serious description of offences, such as burglaries, breaking into shops, and robberies on the highway, are most rife in that opulent city.

In the metropolis the increase in the criminal classes during the twelvemonth precedent to the 29th September, 1861, over the returns for the previous year, amounted to less than 0·6 per cent.; in the number of prostitutes the increase was 2·6 per cent. In the pleasure towns, such as Brighton, Bath, &c., there was an increase in the criminal classes amounting to 20·8 per cent. and in the number of prostitutes of 12·0 per cent. In the Eastern group of agricultural counties there has been a decrease in the numbers of the criminal classes amounting to 26·4 per cent. under the returns for 1860. In the towns situated in agricultural districts a decrease appears in the returns of the criminal classes, and an increase in the number of prostitutes. In the commercial ports and in the seats of the cotton and linen manufacture, and of the small and mixed textile fabrics, there was a slight decrease in the number of the criminal classes. In the seats of the hardware manufacture there was a decrease of 10·7 per cent. in the number of the criminal classes during the period specified.



In the commercial ports the number of prostitutes in proportion to the population continues, as hitherto, the highest. The proportion of the criminal classes at large, as shown in the returns for 1860, was 1 in 136·8 of the total population; the proportion of prostitutes 1 in 549·6. The corresponding returns for 1861 (allowance having been made for the increase of population), are 1 to 163·0, and 1 to 636·8. We are therefore advancing, though it be slowly, in the scale of civilization, as tested by its two opposites, vice and crime.

The number of prisoners in custody on the 29th September, 1861, was, in local prisons (exclusive of debtors and military prisoners), 15,601; in the convict prisons 7,123; and in reformatories 3,199. A total of criminal classes is thus produced amounting to 148,982, or 1 in 134. The total for 1860 was 1 in 115, as based upon the census of 1851. There is, therefore, as calculated according to the late census, one of the police force to every 966 of the population; one of the criminal classes to every 134; and, consequently, one of the police to every 6·9 of the criminal classes. The total number of houses of bad character of every description was 23,916.

The tables of which we have given the foregoing account relate to the prevention of crime, the succeeding ones relate to its prosecution. These tables detail the number of indictable offences, and the disposal of the charges founded on them in each district, in periods of three months.

In the total number of crimes returned for the twelvemonth precedent to the 29th of September, 1861, there was an increase of 404, or 0·8 per cent. as compared with the preceding year, which was less prolific in this item by 3·1 per cent than the year 1859. The number of apprehensions in 1861 exceeded the returns for 1860 by 2,312, or 9·3 per cent. An improvement in the apparent, but not necessarily in the real, efficiency or veracity of the police is shown by the fact that the apprehensions were 53·5 per cent. on the number of crimes, which was a higher proportion than that of either of the preceding

years. It appears that the greater proportion of crimes is committed in the winter quarters, owing probably to the season, and the scarcity of employment that then exists, while, on the other hand, as might naturally be expected, the proportionate number of apprehensions is greater in the summer months. The total number of indictable offences committed in 1861, amounted to 50,809, and of apprehensions 27,174. The number of murders reported for the year was 106, being seven more than the number for 1860. Of these, ten were in the metropolitan police district; but no case occurred in the City of London. Connected with these cases there were 128 apprehensions, in which 90 persons were committed for trial.

The cases of concealing the birth of infants were 151, of which 97 were reported by the county constabulary; 34 took place in boroughs, and 20 in the metropolitan police district. The numbers for the same districts for the year 1860, were respectively 103, 24, and 20. The number of burglaries for 1860 was 2,221; for 1861, the number was 2,791; of these 48·9 per cent. were reported from the counties, and 51·1 per cent. from boroughs. The proportion to the whole population of persons charged with indictable offences, varies very much according to the district. In the metropolis this proportion is as 1 to 263; in Birmingham as 1 to 354; in Leeds as 1 to 330; in Liverpool, as 1 to 112; and in Manchester as 1 to 58. The more serious offences are, as already noticed by us, most prevalent in Manchester.

Upon being brought before the magistrate, 32·4 per cent. of the persons apprehended were discharged, without further proceedings; 0·6 per cent. were admitted to bail for further appearance if required; 5·1 per cent. were admitted to bail until trial; 61·7 per cent. were committed to prison to await trial at assizes or sessions; and 0·2 per cent. were committed to prison for want of sureties. Of the cases, it thus appears that 67·7 per cent. were proved to the satisfaction of the magistrates. In the preceding year, the corresponding proportion was 65·3 per cent. The proportion of persons committed to trial for the same year

was 59·6 per cent. Of the total number of the persons charged with offences in the twelvemonth precedent to the 29th September, 1861, there were 20,354 males and 6,820 females.

There are about 500 descriptions of offences which must receive at least preliminary investigation by magistrates at petty sessions. Magistrates are, in fact, the only judicial authorities with whom the great bulk of the people are ever brought into contact. Many will be of opinion that some preliminary test besides the possession of property should be used in the appointment of persons invested with such important and extensive functions, and it is not improbable that the stipendiary system will be ultimately extended over the country; but there can be no question that the unpaid magistracy do their work on the whole with remarkable zeal and efficiency.

As the statistics contain a summary of the crimes of each description committed in each quarter of the year, of the number of persons apprehended, charged with each description of offence, and of the manner in which the persons apprehended were disposed of, a test is thus readily presented of the degree of success obtained by the police in the pursuit of criminals. In the class of offences against the person, the number of persons apprehended considerably exceeds the number of crimes committed. The report attributes this to the fact that more persons than one are generally concerned in the same offence, and that this class of cases admits of greater facility than most others of identifying the parties. Personal animosity, and the desire to exclude evidence, have also, we think, some part in producing this result. Of these cases, 81·1 per cent. were successfully pursued by the police, if we assume (as the statistics do) that one person only was sent for trial in each case. But this is a very rough estimate. This proportion was 77·4 per cent. in 1860, and 73·9 per cent. in 1859.

The total of all other offences recorded by the police for the year 1861 (including 209 cases of attempts to commit suicide),

amounted to 42,686, being 951 less than the corresponding returns of the preceding year. For these offences 21,552 persons were apprehended, of whom 7,401 were discharged by the magistrates. There thus remains 14,151, or 33·1 per cent., as the number of cases successfully pursued, the proportion under this category having been 29·4 per cent. for 1860.

The proportion which the total number of cases successfully pursued bore to the total number of alleged crimes, was 36·1 per cent. for 1861, 32·1 per cent. for 1860, and 32·5 per cent. for 1859.

In the number of summary charges for the year 1861, there has been an increase of 2,092, or 1·6 per cent. over the corresponding returns for 1860, in which year there was a decrease of 2·0 per cent. from the corresponding returns for 1859. Of the persons charged summarily before magistrates, in 1861, there were 315,256 males, and 79,461 females proceeded against; 219,875 males, and 43,635 females were convicted; and 95,381 males, and 35,826 females were discharged. The convictions bore a somewhat higher proportion to the total number of persons charged in 1861, than they did to the number of persons charged in the preceding year. Amongst the females, the proportion of convictions to the number of females proceeded against, has been, as was the case in preceding years, about 14 per cent. smaller than the like proportion in the case of the males. This difference may, perhaps, be accounted for partly through the gallantry of the accusers, and partly through the greater difficulty of identifying females.

The proportion of the number committed to prison, to the total of the convicted, was somewhat higher in 1861 than in the preceding year, having been 23·4 per cent. in 1861, for 20·8 per cent. in 1860. Of offences of larceny by offenders under sixteen years of age, there has been an increase of 462, or 7·6 per cent., in the present returns, as compared with those for 1860. In the total number of offences of stealing dogs, birds, vegetable productions, &c., or what we may term fancy,

larcenies, there is an increase in the present returns of 6,337, or 17·1 per cent., as compared with those of 1860. In the class of malicious offences—of damage and trespass—there is likewise an increase in the present returns of 247 cases, or 6·6 per cent. over the corresponding returns of the preceding year. There were committed, in the year 1861, 2,935 aggravated assaults on women and children, 11,248 assaults on, or resistance to, peace officers when discharging their duties, and 62,498 cases of common assault. There is the small decrease of 0·7 per cent. in these returns as compared with the like returns for 1860, which again exhibited a like small decrease from the like statistics for 1859. The total number of offences against the game laws in the past year was 8,483. Under the item of night poaching, there is a decrease of 230 cases, or 21·8 per cent., as compared with the like returns for 1860. Justices, however, still appear sufficiently inclined to consider that the laws and statutes relating to game call for the most comprehensive construction. Under the head of drunkenness, we find a decrease of 7·0 per cent. in 1861, as compared with the like returns for 1860, in which year likewise there was a slight decrease from the like returns for 1859.

The total number proceeded against in each year, from 1857 down to 1861 inclusive, were as follows:—

	1861.	1860.	1859.	1858.	1857.
Total proceeded against	394,717	384,918	392,810	404,034	369,233
Convicted .....	263,513	255,803	257,810	260,290	233,474
Discharged .....	131,207	129,115	135,000	143,744	135,759

The proportion which the convictions bear to the total number proceeded against shows a progressive increase in the foregoing tables. In 1857 it was 63·2; in 1858 it was 64·4; in 1859 it was 65·6; in 1860 it was 66·4; and in 1861 it was 66·7. In the total number proceeded against by indictment and summarily there is an increase of 12,111, or 2·9 per cent. over the like returns for 1860. Comparing the numbers

proceeded against with the numbers reported to be at large, we find that the activity of the police in repressing crime has, during the year 1861, greatly exceeded that indicated by the statistics for 1860.

Of the 57 heads of offences, upon conviction for any of which by justices an appeal may be brought before the court of quarter sessions, appeals were brought only under 17 heads. There were 49 appeals in all; in 31 the convictions were affirmed; in 18 they were quashed. As the total number of summary convictions was 263,510, the original decision was thus reversed only in one case out of every 14,639 decided out of sessions.

Sixty cases were submitted under the statute 20 and 21 Vict., c. 43, for the decision of the superior courts at Westminster. Of the results of 45 of these which were submitted to the Court of Queen's Bench no return is given. Nine cases were submitted to the Court of Common Pleas; of these 6 were affirmed, and 3 reversed. Six cases were submitted to the Court of Exchequer; of these 2 were affirmed, and 4 were reversed.

The coroners' returns form the conclusion of the first division of the statistics.

The following table shows the total number of each description of verdict given at coroners' inquests for each of the last six years:—

	1861.	1860.	1859.	1858.	1857.	1856.
Murder .....	210	268	204	183	184	206
Manslaughter .....	200	144	198	197	187	271
Justifiable Homicide.....	8	8	23	4	6	6
Suicide .....	1,324	1,367	1,240	1,275	1,349	1,314
Accidental Death .....	9,213	9,225	9,241	8,947	8,930	9,716
Injuries, causes unknown .....	216	313	350	264	237	424
Found Dead.....	2,787	2,868	2,917	2,611	2,949	3,188
Natural Death.....	7,080	6,995	6,358	6,365	6,315	7,192
	21,098	21,178	20,581	19,846	20,157	22,321

Of this total, 69·9 per cent. were males; 30·1 per cent.

were females; 27·8 per cent. were infants; 8·0 per cent. were between the ages of seven and sixteen years; 48·3 per cent. were adults; and 15·9 per cent. were 60 years old and upwards.

We now come to the second branch—criminal proceedings—of the first part of the statistics. The decrease in the number of commitments observable in the statistics for each of the three last years does not continue its progress in the present returns. The number of commitments in the last year has exceeded the corresponding number for 1860 by 2,327, or 12·7 per cent., and the average of the three preceding years by 8·0 per cent. The commitments for murder and attempts to murder, taken separately, have respectively exceeded the like returns for 1860 by 30·6 per cent., and 26·0 per cent. There was a decrease, however, of 30·0 per cent. in those returns for 1860 as compared with the like returns for 1859. Excepting 1860, the returns for 1861, under this head, are less than the like returns for any other year since 1855. The report states that the crime of concealing the birth of infants shows a tendency to increase every year. Taking the average of the ten preceding years, there was a decrease in the commitments for manslaughter in 1861 of 11·3 per cent.

There has been a considerable increase in the present returns over those for 1860 of unnatural offences, rape, and assaults, aggravated and common; but a comparatively slight decrease of the number of offences of bigamy. Violent offences against property have greatly increased, although this class of offences had shown a decrease for each of the three preceding years. The number of cases of horse stealing is smaller than the same item for any other year for which we have had returns.

The number of persons tried before the various courts having jurisdiction to try criminal cases, and the proportions of the numbers before each court for trial to the total number for trial in 1861 were as follows:—

	1861.		1860.	
County Quarter Sessions				
Courts.....	7,965	43·5	6,632	41·4
Middlesex County Sessions	1,658	9·0	1,626	10·2
Borough Sessions Courts ...	3,917	21·4	3,547	22·2
Circuit Assize Courts .....	3,623	19·8	3,108	19·4
Central Criminal Court .....	1,163	6·3	1,086	6·8
Total .....	18,326	100·0	15,999	100·0

These proportions are almost constant for each year, so that the practitioner about making choice of a district has steady data for determining his selection.

The following was the result of the proceedings against those committed, or bailed to appear, for trial in the years 1861 and 1860 :—

	1861.	1860.
Not prosecuted and admitted evidence . . . . .	56	77
No bills found against . . . .	929	769
Not guilty on trial . . . . .	3,438	3,061
Acquitted and discharged .	— 4,423	— 3,907
Acquitted on the ground of insanity . . . . .	16	12
Found insane . . . . .	8	12
Detained as insane . . . .	24	24
Sentenced to death . . . . .	50	48
„ to penal servitude . .	2,450	2,229
„ to imprisonment . .	11,233	9,656
„ to whipping, fine, &c. .	146	145
Convicted . . . . .	— 13,879	— 12,068
Total committed, &c. . . .	18,326	15,999

The proportion of the number of capital sentences in 1861 to the total convictions is somewhat less than the like proportion for 1860. If no change had been made in our capital code in the latter year, the number of capital sentences for 1861 would have been fifty-three. Of the fifty capital convictions, twenty-six only were for murder. The proportion



of the number of persons sentenced to reformatories or to whipping, fine, &c., to the total convictions, was 2·9 in 1861; 3·3 in 1860. It appears that during 1861 only 610 convicts were removed to Western Australia.

The number of capital sentences for murder in 1861 was 27; in 1860 it was 17. Of attempts to murder, attended by dangerous bodily injuries, in 1861, five; in 1860, nine; of sodomy, in 1861, ten; in 1860, twelve; of burglary, with violence to persons, in 1861, three; in 1860, six; of robbery attended with wounds, in 1861, five; in 1860, three; of arson of dwelling-houses, persons being therein, in 1861, one; in 1860, one; the total for 1861 was thus 50; for 1860 it was 48. In fifteen of the capital convictions the sentence of death was carried into execution. All of those executed were under forty-six years of age.

Of the twenty-two cases brought before the Court of Criminal Appeal under the Act 11 & 12 Vict., c. 78, the judgments in three only were reversed.

Under the head of costs of prosecutions, we find that the average of these costs were, for 1859, for each case tried on indictment, £7 12s. 5d.; on summary proceedings, 17s. 8d. The corresponding numbers were, for 1858, £8 5s. 11d., and 19s. 6d.; for 1857, £9 2s. 3d., and £1 11s. 5d.; and for 1856, £9 14s. 7d., and £1 12s. 6d. The number of Mint cases, in 1861, was 433; in 1860, it was 399.

The total number of persons committed for trial and tried at assizes and sessions in 1861 was 18,438; of these 14,050 were males, and 4,388 were females. The total number of commitments on summary conviction in 1861 was 78,871; of these 55,733 were males, and 23,138 were females; of males 12,945, and of females 646, were committed to prison for debt and on civil process. The number acquitted was less than one-fourth of the total number for trial. This proportion and also the proportion of the number not prosecuted has been for the last eight years almost constant.

The number of recommitted prisoners in 1861 exceeded

the corresponding number in 1860 by 3,401, or by 9·6 per cent. Making allowance, however, for the increased number of committals, the proportion of recommittals to the total number of commitments differs only by 0·4 per cent. in favour of 1861. Little variation appears to exist in the returns for the two years, 1860 and 1861, as to the proportion which the number of those born in each county respectively bears to the total number of commitments, and as to the state of instruction of the persons committed. It appears that 0·3 represents the number of males, and 0·1 the number of females committed who had received a superior education. A greater degree of instruction is always found amongst the males. It is obvious, therefore, that reformatory and educational measures would be likely to be productive of more extensive results in the cases of females than of males. The temptations to which the latter are exposed are, it is clear, less easily obviated than those incident to the employment of females, even assuming, which is not likely to be the case, that the ill-conducted class of both sexes are equally susceptible of moral discipline.

The numbers under detention and the removals during the year were :—

	Males.	Females.			
Criminals.....	10,931	3,574			
Debtors, &c ....	1,009	51	Males.	Females.	Total.
			11,940	3,625	15,565
Committed during the year .....			96,768	32,470	129,238
Removed between local prisons during the year .....			2,735	383	3,118
Total.....			111,443	36,478	147,921

These returns exceed the corresponding statistics for 1860 by 11,191, or 11·1 per cent. as regards the males, and by 1,207, or 3·4 per cent. as regards the females. There were

removed in 1861, to reformatory schools, 1,231 males, and 301 females, and to lunatic asylums, 74 males, and 38 females. There were discharged on pardon or commutation of sentence, 104 males, and 11 females. The number executed was 14, all males. There remained in prison at the end of this year :—

	Males.	Females.	Total.
Criminals.....	12,390	3,645	16,035
Debtors .....	1,255	60	1,315
	13,645	3,705	17,350

The greatest number of prisoners confined at one time was 20,586, of whom about one-fourth were females. The daily average of prisoners throughout the year was 16,513. The report of the sanitary state of the prisons is in favour of 1861, as compared with that for 1860. The number of punishments inflicted in 1861 for offences committed in prison, was 1 to 3·8; this was also the proportion in 1860. A decrease appears in the number of every description of prison officers for 1861, except clerks and schoolmasters, in these there was an excess of 24 over the corresponding numbers for 1860.

The number of tickets of leave granted in 1861 exceeded by 64·7 per cent. the like returns for 1860, which again were more than double the number for 1859. This progressive increase is (as the report observes), owing to the fact that the provisions of the Act of 1857 annually became applicable to a greater number of persons.

An increase of 3 appears in the number of reformatory schools founded under the statutes 17 & 18 Vict. c. 86, & 19 & 20 Vict. c. 109. An increase of 12·3 per cent. likewise appears in the number of persons committed to these schools, as compared with the like returns for 1860. As in 1860, so also in the last year, the largest proportion of the commitments to the reformatories was for the longest period allowed by law. This is what should be expected. Any period short of what

might fairly be considered long enough for the instruction in those schools to impart a sound social education would be doubtless insufficient for any permanent improvement in the youths committed, and would have a tendency to bring this description of schools into unmerited disrepute. Of 189 boys committed to the Middlesex Industrial School, 72, or 38 per cent., had lost one of their parents; 13 had lost both; 7 were deserted by one of their parents; 1 by both; 1 had one of his parents in prison; 13 were otherwise uncontrolled by one of their parents; 19 by both; 16, or 32·2 per cent. of the whole number, had been under the control of one parent; 97, or 51·3 per cent. of both.

The total number of criminal lunatics under detention at the commencement of the year was 776. There were 135 committed during the year 1861; of these 37 were females. An increase of 23, or 2·9 per cent., appears in this category for 1861. There has been likewise a progressive increase in these returns for each of the last four years. Of the lunatics in custody in 1861, 234, or 24·1 per cent., of the whole number were committed for larcenies; 141, or 14·5 per cent. of the whole, for murder; and 98, or 10·1 per cent., for attempts to murder. Of the whole number (970), not less than 604, or 62·3 per cent., belong to the category of "Convicts becoming insane after trial, and removed by order of the Secretary of State." Twenty-nine of these poor unfortunates have been upwards of twenty years under detention. In Bethlehem Hospital, where the whole expenses are paid from the public revenue, the cost per head is £43 10s. 8d. As regards those hospitals, where any portion of the expenses is derived from private sources, it would be useless to strike an average of the cost, which depends so much upon the wealth, generosity, or caprice of individuals.

Now that a sound scheme of judicial statistics is firmly established, it only remains for us to develop the system in order to acquire the very best means of devising the needed legal reforms, and to test their efficacy when carried out.

## Notices of New Books.

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[\* \* It should be understood that the Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**The Shipping Law Manual: a Concise Treatise on the Law Governing the Interests of Shipowners, Merchants, Masters, Seamen, and other Persons connected with British Ships; together with the Acts of Parliament, Forms, and Precedents, relating to the Subject; being especially intended for Popular Use in Seaport Towns.** By W. T. Greenhow, of the Middle Temple, Esq. Barrister-at-Law. London: V. and R. Stephens, Sons, and Haynes. 1863.

To write a text-book of more than five hundred pages, with a modest contribution of original matter occupying only about one-fourth of the volume, will no doubt be regarded by the legal profession as a feat of moral courage, if not of intellectual strength. Old fashioned readers, somehow or other, have a notion that an appendix ought to form a mere subordinate adjunct to a book. Forms, schedules, and matters of detail are supposed to find a fitting place in the last few pages printed in small type. Mr. Greenhow's Manual is in this respect exceptional. It is a volume of appendix, with a little book attached.

Such are the facilities for "padding" in legal literature, that even success in the art does not necessarily imply a high order of merit. A month would be ample time for any industrious author to get up a book on this principle. First of all, correlate Acts of Parliament should be collected, arranged, and incorporated in their entirety. The earlier portion of the volume should contain, in good English, a paraphrase of the said statutes, with references at the foot of the page to the sections and chapters. A digest should lie close at hand for occasional consultation, and the marginal notes of a few cases, as pertinent to the subject as may be, should be interspersed here and there. Finally, some schedules, precedents, forms, &c., may be liberally thrown in at the end, to give bulk and solidity to the whole. The advantages of having all the statutes relating to any given department of law, collated and methodically arranged in

one volume, are undeniably great. What we complain of is, that under the guise and at the price of an original work, we are only purchasing extracts from the statutes at large, set off by a few chapters of preliminary comment. Mr. Greenhow's *Shipping Law Manual* is nothing more. The book proper—which is begun, continued, and ended in 155 pages—affords very scanty evidence of research or originality. A remarkable delicacy is exhibited on the subject of citing cases, the preference being given to the older and more classical decisions. This, it must be allowed, is not an accidental circumstance, but the result of the author's plan and design. In the introductory chapters it is explained "that the present book has been compiled, not principally with a view to aid the professional reader, for, as will be gathered from its title, it is devoted to rudimentary matters, rather than to minute inquiries and intricate disquisitions, and scarcely professes to hold forth much instruction to those who must be assumed to be already nearly proficient. . . . But it is especially intended, as will be seen, for the general reader, whose interests, nevertheless, require him to be acquainted with the leading features of shipping law, and it has been endeavoured, in his behalf and in order to adapt it to his purpose, to confine its discussions as far as possible to elementary matters, and to narrow the subjects dealt with so as to avoid an embarrassing accumulation of matter." Again, with respect to the cases cited, the author adds, "the book does not profess to afford a complete catalogue of decided cases, or even of all which have been contributory to the establishment of a principle or doctrine now in active force, for it has been thought that to do so would contribute more to the embarrassment than advantage of the less instructed reader, by tempting him to labour through—in many cases fruitlessly, and at the risk always of filling his mind with many crude and contradictory impressions—a long series of decisions, in the hope of finding one precisely suitable to his occasion. . . . But, although the volume is published more expressly for the assistance of the general reader, it is hoped that it may not be entirely unserviceable in the hands also of the profession."

As a rule, the writing of law books for "general readers" is about as useful as a popular edition of the *Pharmacopœia*, or a new *Integral Calculus*, "for the million." For really practical purposes it is generally worse than useless. Half our obstinate litigants are men who have "a little learning," which leads them to do "dangerous things." No doubt, many readable books have been written on legal subjects, but they invariably avoid the region of dry practice. "*Blackstone's Commentaries*," and "*Lord St. Leonards' Letters on Real Property Law*," might be read with advantage, and even with pleasure, by every English gentleman; but no one will be allured thereby to attempt the ruinous experiment of becoming "his own lawyer." Mr. Greenhow is not consistent. If the *Manual* is intended for professional men in actual practice, the information given is too scanty and elementary; if for

the "general reader," why load the book with forms, schedules, &c., of no use but for practical purposes? The Manual may possibly supply a want and prove very useful. We venture to suggest that it would not be less useful if reduced to one-half its present bulk. The statutes, as far as we have been able to pursue the verification, have been accurately transposed; and the forms, precedents, &c., appended, are such as may be safely adopted. The chapters on General Average, on Demurrage, and on Salvage and Wreck, furnish abundant evidence that the author has the power of seizing salient principles, and of expounding the same with clearness and force. Let him in future check the ambition of writing big books with little labour, and, in consideration for the pockets of his professional brethren, bear in mind the important distinction between book making and writing a book.

An Elementary View of the Practice of Conveyancing in Solicitors' Offices, with an Outline of the Proceedings under the Transfer of Land and Declaration of Title Acts, 1862, for the Use of Articled Clerks. By Edmund Smith, Esq., B.A., late of Pembroke College, Cambridge, Attorney and Solicitor. London: Butterworths, 7, Fleet Street. 1863.

THIS is a Manual of Conveyancing Practice, written by a solicitor, expressly for the use of articled clerks. The author does not profess to expound the great principles of real property law, but rather to present a concise elementary view of the daily business transacted in the office of a conveyancing solicitor. For the first twelve months of his articles, the student will, no doubt, find it a very useful *vade mecum*. Instead of plodding on blindly, and picking up his legal knowledge from hand to mouth, under the guidance of his experienced principal, bewildered with abstracts and requisitions, rushing hither and thither, doubtful if not aimless, with drafts, deeds, schedules, and memoranda—he will be able, by consulting these chapters on Purchases, Sales, Mortgages, Bills of Sale, Leases, Settlements, Wills, &c., to take a calm and comprehensive view of his work. Half the instruction given in an attorney's office is at first lost, and much time absolutely wasted, from not perceiving the scope of each proceeding, and the bearing of each step upon the final result. Under a sensitive dread of being a bore by propounding too many questions, difficulties are slurred over, and opportunities lost for many years, perhaps for ever. We feel confident that Mr. Smith's little treatise will help to clear away many of those perplexities which puzzle the student, and enable him, instead of groping along in the dark, to work systematically and with well defined purpose. The information given is, as far as we have been able to discover, quite accurate, and all the matter under the category of "advice" deserving of the best consideration. But there is a minuteness about unimportant details, and here and there

a conspicuous surplusage which might well have been avoided. The merest tyro does not require to be informed that after all the formalities of purchase and sale have been gone through, "it will now only remain for the clerk to ascertain the purchaser's address;" nor is it at all necessary that a legal manual should be occupied with information which might be found in the London Directory, as, for instance, that the "Middlesex Registry Office is in Bell Yard, Chancery Lane, London." We observe also, in passing, that it would have been more in accordance with the observances of literary courtesy if the greater part of page 8 (obviously extracted *ipsisssimis verbis* from a well-known chapter in "Williams's Real Property"), had been adorned with the usual inverted commas. These are, however, faults of minor importance. There is a method, clearness, and completeness about the book which will, no doubt, ensure for it a large circulation. The thirty-eight pages devoted to an explanation of the Transfer of Land Act, 1862, with the orders that have been issued, will be read with much interest by conveyancers. After the lucid interpretation of the Act and Orders throughout the 8th chapter we read its concluding paragraphs with some regret. The author concludes somewhat abruptly, by stating, "I have said nothing of the means of opposing registration upon notice of the application; nothing of the initiative precaution of entering a *caveat* against a property being registered. I have said nothing about the means of cautioning the registrar against entering instruments and dealings with the property when it is already registered, or of the notice to which the cautioner is entitled. I have said nothing about equitable charges by deposit of the land certificate; nothing about the requirement of having all title deeds of the registered property stamped with an office stamp; nothing, finally, about getting a property off the register." If on account of the novelty of the Act there were really nothing to say on these highly important subjects, the omission would have been creditable to the author's judgment and sense of duty. That, however, is not so. Considering the many merits of the work, we have no doubt Mr. Smith may be called upon at a future time to prepare another edition, and we trust that, as to the surplusage above alluded to, more important matter may be substituted, or at all events appended thereto.

The Law of Joint-Stock Companies; containing the Companies Act, 1862, and the Acts incorporated therewith; with Copious Notes of Cases relative to Joint-Stock Companies, the Rules and Forms of the Court of Chancery in Proceedings under the above Act, and Forms of Articles of Association. By Leonard Shelford, of the Middle Temple, Esq., Barrister-at-law. London: Butterworths. 1863.

THE object of the Companies Act, 1862, was to incorporate, in a single and exhaustive statute, the enactments which regulate the



formation, management, and winding up of Joint-Stock Companies. While many sections from other Acts of Parliament relating to Joint-Stock Companies have been embodied, *totidem verbis*, on the other hand some of the most important provisions are entirely new. Thus we are now made acquainted for the first time with companies "*limited by guarantee*," i. e., companies in which the members may stipulate for a limited contribution to the assets upon the winding up of the company. In the case of a company limited by guarantee, it is enacted that "no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association." Practitioners will also bear in mind, that the independent jurisdiction of the Court of Bankruptcy, in relation to the winding up of joint-stock companies has been abolished, and their interference in such matters will henceforth be under the direction and control of the Court of Chancery. Since the Act of 1859, the 21 & 22 Vict., c. 78, a special officer has been appointed, called the creditors' representative, whose business it was to protect the interests of the creditors during the process of winding up the affairs of the company. That office has also been abolished. Lastly, insurance companies, instead of forming a distinct group, and governed by their own special rules, are made subject by this statute to the same provisions as other companies. With these, and a few less important exceptions, the Act of 1862 is almost a transcript of former joint-stock companies' Acts, having the invaluable advantage of containing in one statute all the written law on the subject. Very many of the reported decisions will, therefore, be still applicable, and only required to be logically arranged under the provisions of the new Act.

Mr. Shelford's reputation as a legal author, it is needless to say, has been long ago established. Although some fifteen standard text-books bear the author's name—text-books that are on the shelves of almost every lawyer's library, and consulted in the course of practice with the utmost confidence in the reliability of the information they furnish—the present volume, while not so elaborate, and having a narrower scope, will bear comparison with the best of them for clearness of diction, unity of design, and thoroughness of execution. Taking the "Addenda," which must have been sent off to press at the eleventh hour, probably after the bulk of the book was in type, the decided cases are brought down to almost the last published in the current reports. They have been selected with much discrimination, and presented to the reader with a conciseness which never obscures the meaning. The explanatory notes are always pertinent and instructive; not mere paraphrases of the section, set off with a random case or two picked out of a digest. The observations on the winding up of companies and associations, for instance, under the 99th section; upon fraudulent preference, from page 188 to page 206, may be referred to as excellent specimens of clear and useful writing. Mr. Shelford has also incorporated in the same volume the following cognate statutes, with notes and explana-

tions:— Railway Companies' Arbitration Act, 1859 ; Criminal Offences by Directors, &c., of Public Companies, 24 & 25 Vict., c. 96 ; The Industrial and Provident Societies' Act, 1862, 25 & 26 Vict., c. 87. Three important schedules are given, as well as the rules and orders of the High Court of Chancery, to regulate the mode of proceeding under the Companies' Act, 1862, while the concluding chapter is devoted to the consideration of the formation of companies by letters patent. By this volume Mr. Shelford has added to his reputation as a commentator, and increased the indebtedness of the profession by a valuable and very welcome contribution to the lawyer's library.

An Analytical Digest of the Cases published in the New Series of the "Law Journal" Reports, and other Reports in the Courts of Common Law and Equity, and Appeal in Bankruptcy, in the House of Lords, the Privy Council, in the Court of Probate, the Court for Divorce and Matrimonial Causes, and in the High Court of Admiralty. From Michaelmas Term, 1855, to Trinity Term, 1860, inclusive. By Francis Towers Streeten, Esq., and George Stevens Allnutt, Esq., Barristers-at-Law. London : Edward Bret Ince, 5, Quality Court, Chancery Lane.

THIS Digest is in continuation of seven others, published at different times, containing the cases reported in the "Law Journal" reports, and other contemporary reports, since the year 1822.

Principles of the Law of Scotland, contained in Lord Stair's Institutions ; with Notes and References as to Modern Law. By Patrick Shaw, Member of the Faculty of Advocates, and Sheriff of Chancery. Edinburgh : T. and T. Clark, Law Booksellers, 88, George Street. London : Stevens, Sons, and Haynes ; and Simpkin and Co.

LORD Stair published two editions of his "Institutions of the Law of Scotland," the one in 1681, and the other in 1693, two years before his death. A period of more than thirty years has elapsed since the latest edition of this standard work was published. "During that time," says the author of the present volume, "great and important changes have been made by Parliament in almost every department of our law." Mr. Shaw has, therefore, attempted to embody the principles of the law of Scotland contained in Lord Stair's "Institutions," "in a form which may facilitate the perusal of that great work, and at the same time point out the changes which have been made in Scotch jurisprudence."

**Remarks on the Constitution and Practice of Courts Martial ; with a Summary of the Law of Evidence as connected therewith ; and some Notice of the Criminal Law of England with reference to the Trial of Civil Offenders.** By Captain Thomas Frederick Simmons, R.A. Fifth Edition, revised. London : John Murray, Albemarle Street.

THE fifth edition of this well-known and most useful work has been carefully revised throughout, with reference to the Mutiny Acts and Articles of War of the present year, the Naval Discipline Act, 1861, the Criminal Law Consolidation Acts, and other recent statutes, and the Queen's Regulations for the Army, dated 1st December, 1859, and the warrants, orders, and circulars now in force.

**A Supplement to the Seventh Edition of Stone's Practice of Petty Sessions.** By Lewis W. Cave, of the Inner Temple, Barrister. London : V. and R. Stevens, Sons, and Haynes.

THIS supplement contains chapters on the summary jurisdiction of Justices of the Peace under the Criminal Law Consolidation Acts, and under the Act for the Prevention of Poaching. The decisions on the repealed statutes are also given, wherever they are calculated to assist in the construction of, or to ascertain the practice under, the substituted enactment.

**A Handy Book on Property Law ; in a Series of Letters by Lord St. Leonards.** Seventh Edition. William Blackwood and Sons, Edinburgh and London.

THE seventh edition of this most useful and popular little book is re-issued, with a portrait of the author, and the addition of a letter on the new laws for obtaining an indefeasible title. The edition, neatly got up for the sum of three shillings and sixpence, is likely to increase the wide and well-deserved popularity of the work.

**A Concise Treatise on the Construction of Wills.** By Francis Vaughan Hawkins, M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. London : William Maxwell. Dublin : Hodges, Smith, and Co. 1863.

THIS work possesses so many merits that we feel it would be unfair to the author, as well as to the profession, upon the eve of going to press, to write only a short notice. We propose, therefore, to reserve our observations for the next Number.

**Handy Book on the Diminution of the Poor Rates.** By Standish Grove Grady, Esq., Recorder of Gravesend. London : Wildy and Sons. 1862.

THIS manual has been prepared by Mr. Grady, for members of Parliament, county magistrates, boards of guardians, and ratepayers. The author quotes largely from Mr. Pashley's work on "Pauperism and the Poor Law;" Mr. Scratchley's work on "Industrial Dwellings;" Mr. Gilbert's pamphlet on "Poor Law Reform," and the Report of the Poor Law Commissioners and Inspectors. The first portion contains a concise historical statement of the origin and development of our poor laws. But the main object of the work is to show "that the law of settlement should be wholly repealed; that the various provisions for raising and administering relief to the poor be consolidated into one statute; that the sum needed for such relief be raised by parochial rates on real property; that two-thirds of this sum be raised by a pound rate equal throughout the country, and the remainder by a further pound rate, raising in every parish a sum equal to one-third of the actual expenditure of such parish." Referring to the sufferings of the poor in Lancashire, Mr. Grady deprecates the legislation of 1862, in favour of raising loans to meet the exigencies of the crisis, and arguing with great force in favour of a rate extended in and extending over the widest area. "The real property of the kingdom," observes the author, "is, at an under estimate, valued at £120,000,000 a year; a rate of 4*d.* in the pound upon that property would produce £4,000,000. This would not be felt by any one, whereas, by confining the relief to a parish or union, or even a county, the burden falls disproportionately heavy upon the few, which would be light if cast upon the whole." The importance of this question is becoming, and will become every day, more grave. The difficulty must be grappled with, and we think the learned Recorder has contributed some help towards its solution, by the accurate information, the catholic sentiments, no less than the deep philanthropy which adorn the pages of this unpretending little treatise.

**An Elementary View of the Proceedings in an Action at Law.** By John William Smith, Esq., late of the Inner Temple, Barrister-at-Law, Author of "Leading Cases," "A Compendium of Mercantile Law," &c. Eighth Edition. Adapted to the present practice.

By Samuel Prentice, Esq., Barrister-at-Law, Editor of "Chitty's Archbold's Practice." London : V. and R. Stevens, Sons, and Haynes ; H. Sweet ; and W. Maxwell. 1863.

• **SMITH'S Action at Law** is so well known, and its merits so thoroughly appreciated, that it would be worse than useless, in reviewing the eighth edition, to enlarge upon its general character. The clear analytic powers of the author of the "Leading Cases"

and "Mercantile Law," have raised this Elementary View of the Proceedings in an Action at Law to the rank of a standard book. With students, it has always been very popular. They can consult no better authority ; none so simple, for the purpose of obtaining a preliminary conception of proceedings in a suit at common law. Hunter's Suit in Equity, and one portion of Goldsmith's Doctrine and Practice of Equity, have been composed for Chancery practice, on the plan laid down by the author of this text-book. The last edition contains new and valuable information on costs, execution, the examination of articted clerks, and arbitration. The chapter on Arbitration is the longest and most valuable addition ; and for this we are indebted to the able editor, Mr. Prentice. The student will find in this chapter the form of submission to arbitration by consent ; the rule as to amending, enlarging, and revoking submission ; the mode of proceeding before arbitrators, how an award may be altered, published, set aside, and enforced, together with a statement of the costs incurred, and the stamps to be impressed. He will also find a profitable reading on the Common Law Procedure Act, 1854, as to compulsory arbitration. Several recent cases are cited to illustrate the judicial interpretation which has been given of the sections of that statute, bearing on the subject of compulsory arbitration. The chapter on Execution, instead of being a meagre outline as in previous editions, now contains a very ample exposition of the process of the Common Law Courts after judgments signed. The practitioner will soon outgrow the information herein contained, and be driven to consult other authorities for learning too minute and intricate for a work of this design ; but to the student entering upon the labour of mastering one department of our great jurisprudence, viz., the common law, we can recommend him to no better manual than to this clear and concise history of an Action at Law.

**The Practice of the Court of Probate in Common Form Business.**

By Henry Charles Coote, F.S.A., Proctor in Doctors' Commons.

Also a Treatise on the Practice of the Court in Contentious Business. By Thomas H. Tristram, D.C.L. Fourth Edition.

London : Butterworths. 1863.

A GREAT portion of the learning of this book was, until very recently, kept as the secret mystery of a distinct branch of the profession. Mr. Coote claims the honour of being the first who, in a monograph form, has explained the principles which regulate the granting of probate and letters of administration. Since the Legislature has thrown open to the whole profession the practice which formerly had belonged exclusively to the Proctors, the necessity of such a work as this was imperative and obvious. Mr. Coote has incorporated with the new Statutes and the modern practice as established by the distinguished Judge who presides over the

Court, a vast amount of ancient lore, with which many of us have hitherto not been familiar. His book, though on the dry subject of practice, is one which might be read through with more than ordinary interest and advantage. In some respects it appears to be wanting in completeness. It can scarcely be said to be to the Court of Probate what Lush and Archbold are to the Common Law Courts at Westminster. The reason for this is evident; it is so, because the Probate Court is a new one, and has much of its practice unsettled. When we say that Mr. Coote has done his work well, we only reiterate the recorded verdict of the profession. In this, the fourth edition, Mr. Coote has made such additions to the original work as were rendered necessary by the issuing of a new and consolidated set of rules and fees for the Court of Probate, by the special practice arising out of the 24th and 25th Vict. c. 114, and by the recent decisions of the learned Judge of the Court. After a careful perusal of the revised edition, we are able to say that Mr. Coote has spared no trouble to make his valuable work still more useful to the profession. The book is divided into two parts; the former written by Mr. Coote, on the common form business of the Court of Probate; and the latter by Dr. Tristram, on the contentious business of the Court. Common form business is defined to be "the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probate and administration through the Court of Probate in contentious cases, when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging *caveats* against the grant of probate and administration." In the treatment of this part of the subject, Mr. Coote gives an elaborate explanation, extending over 192 pages, of the principles which regulate the granting of probate and administration. He then very ably discusses the purely practical steps which must be taken by solicitors and proctors in making their application in common form; and in the Appendix we have a most useful paper, entitled, "Directions for describing Testators or Intestates, and persons applying for Probate and Administration," together with all necessary forms, with the statutes, rules, and tables of fees. Mr. Coote has found a worthy coadjutor in Dr. Tristram. The practice of the Court in contentious business has been treated by him in a very able and concise manner. Dr. Tristram not only explains the ordinary practice of the Court in proceedings on motion, by petition, and in suits for obtaining probate in solemn form, but also touches upon the jurisdiction which has been given to the county courts in contentious business. We wish the learned Doctor had treated this more fully. The judges and practitioners of the county court stand in need of further information and guidance in connexion with this subject—information which Dr. Tristram is eminently qualified to supply.

The Criminal Law Consolidation and Amendment Acts of the 24th and 25th Vict., with Notes, Observations, and Forms for Summary Proceedings. By Charles Sprengel Greaves, Esq., Q.C. Second Edition. London: V. and R. Stevens, Sons, and Haynes; H. Sweet; and W. Maxwell. 1862.

THE name of Mr. C. Sprengel Greaves will be historically connected with the consolidation of the criminal law in this country. Considering the valuable services rendered during many years by the author, to whose work we now call attention, no one will think the following apology for its publication at all in bad taste:—"As I had the honour to be entrusted with the preparation of the 14 and 15 Vict., c. 19, 'An Act for the Better Prevention of Offences,' and the 14 and 15 Vict., c. 100, 'An Act for the Further Improving the Administration of Criminal Justice,' and watched those Acts step by step as they passed through Parliament, as well by attending the committees of both Houses of Parliament upon them, as otherwise, Lord Campbell, C. J., strongly urged me to publish them, with notes explaining the alterations in the law which were effected by them, and the reasons for those alterations; and, accordingly, I published a little work with that object; and well assured am I that if Lord Campbell had survived the passing of the present criminal bills, he would have urged me to undertake a similar publication with respect to them. Impressed, therefore, with that conviction, and as a small tribute to the memory of Lord Campbell, I determined to publish these Acts."

Within a few months of the passing of the Criminal Law Consolidation and Amendment Acts, several text-books were issued, bearing the names of well-known authors. Although the materials were in common, each author pursuing his own plan, and writing with a special object, the results have been different, but we think in every instance valuable. Mr. Archbold has embodied in his edition a considerable amount of learning on criminal law which had before appeared in the larger Practice, giving, what we do not find in the other text-books, forms of indictment pursuant to the new Acts. Mr. Davies, in addition to critical and explanatory notes illustrated by cases, has supplied an admirable table of indictable offences, as well as of summary convictions, similar to those furnished by Okey in the Magisterial Synopsis. The edition of Mr. Saunders and Mr. Cox has been well received, on account of peculiarities of arrangement, special facilities for reference, and pointed observations upon important topics. Mr. Greaves has adopted a plan which has the merit of being simple, complete, and logical. "The Acts have been accurately printed from the statutes themselves, and to each section a note is appended. If the enactment be old and unaltered, the note simply states the enactment or enactments from which that section is taken. . . . Where a clause is new, either in England or Ireland, this is pointed out. Where a clause or part of a clause is

altogether new it is printed in *italics*, and the note explains the reason for it, unless, indeed, the reason be too plain to need any explanation.

. . . Where any part of any old enactment is omitted or transposed, the note points this out, and assigns the reasons for it. In a few instances, where it has seemed that some doubt which existed on some old enactment might be removed, or some other useful object might be obtained by deviating from the proposed limits of the work, I have ventured to do so."

That the first edition should have been disposed of in the short period of one year, notwithstanding the publication of rival works of great merit, might be taken as a good proof that the method of expounding the new statutes pursued by Mr. Greaves is well adapted to meet the wants of the profession. The former edition was confined to pointing out the alterations effected by those Acts, and the reasons for them. To the present edition is added an Appendix, containing plain and concise directions as to such of the summary proceedings under the new statutes as seemed to require them. New forms for summary proceedings under the Larceny and Malicious Injuries Acts, have been formed by the author, from those in Jervis' Act, 11 and 12 Vict., c. 43, with such alterations as to adapt them to proceedings under these Acts. Valuable new matter will also be found on the issuing of Search Warrants, forms for which are given, together with directions as to the mode of obtaining them.

Before concluding this notice, it is but simple justice that one word of praise should be said with respect to the introductory chapter. It is a far more elaborate and complete history of criminal law legislation than can be found in the other text-books to which reference has been made. This was to have been expected. For nearly nine years the learned author was himself engaged, almost continuously, in the difficult and important work of consolidating the criminal law. Many of the amendments originated with himself; and perhaps "no one has had the same, or, indeed, anything like the same means of acquiring that information which, if not absolutely necessary, is very useful for writing such a work."

*The following books have been received, and will be noticed:—*

The Transfer of Land and Declaration of Title Acts, 1862. By R. Denny Urlin. London: William Maxwell; Henry Sweet; and V. and R. Stevens, Sons, and Haynes.

Shall We Register Title? or, Objections to Land and Title Registry Stated and Answered. By Tennison Edwards, Esq. London: Chapman and Hall.

Jurisprudence. By Charles Spencer Mark Phillips. London: John Murray. 1863.



## Events of the Quarter.

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IN our Number for November last we published an article on the duties of Lords Lieutenant and their Deputies, consisting chiefly of a letter from Mr. John Harward, Clerk to the Lieutenancy of Worcestershire, to Lord Lyttelton. The letter contained new and elaborate information on the subject, and attracted considerable attention. Mr. Harward is anxious we should state that he was assisted in the preparation of the letter by Mr. John Whitehead, Barrister, of New Square, Lincoln's Inn.

The exercise of belligerent powers at sea by the American States, and the new position in which England finds herself as a neutral in maritime war, have produced for some time past a succession of questions on international law, accompanied, we fear, by increasing acrimony on both sides of the Atlantic. As we write, the relations between the Governments of London and Washington are becoming so menacing that it is difficult to see how peace is to be long preserved unless some frank understanding be speedily arrived at. On the one hand, it is believed that a strong despatch from Mr. Seward is now on its way across the Atlantic in reference to the Alabama; and on the other, it is certain that Lord Russell has addressed remonstrances to the Cabinet at Washington concerning the seizure of British vessels by American cruisers, and the conduct of Mr. Adams in issuing a permit to an English ship trading to a neutral port. Both nations are, therefore, indulging in the unprofitable but irritating task of recrimination; each angry at its own injuries, and but little disposed, we fear, to do justice to the other. In another part of this Number we have expressed our opinion at some length, and without hesitation as to the wrong done in the case of the Alabama; and it is equally clear that neither Mr. Adams nor Admiral Wilkes have kept within the limits of international comity in their dealings with England. Under these circumstances there would be little real danger of a rupture if the affairs of nations were conducted on the same principles of common sense and equity as those of individuals. If in private life two gentlemen find themselves brought into unfortunate relations with each other, owing to misunderstandings, and offence given on each side, nothing is easier or more common than by accepting a sort of set-off for the mutual injuries, through frank explanations, or the intervention of a third party, to produce a reconciliation, which not only renews, but can even increase, friendship. Nor is it hopeless to obtain the same result between angry nations, however excited and aggrieved, if their affairs can only be kept in the hands of upright, cool-headed men

unruffled by personal considerations, who will pursue through all difficulties the paramount object of peace. But, unhappily, this condition is not being fulfilled. The inevitable disputes which have arisen between ourselves and the Americans, as neutrals and belligerents, are passing from the region of diplomacy and of the calm dignity which Lord Russell has well maintained, into the passion of popular debate, and the unscrupulous writing and talking of political faction. Mr. Roebuck, in putting a question in the House of Commons, on April 23rd, thought fit to indulge in a speech of the most intemperate and offensive description; and some minor lights of the Conservative Opposition succeeded in imitating his bitterness of tone, though not, perhaps, his pointedness of expression. There can be no greater blot on our civilization than that war should be capable of being produced between two nations, without the pretence of the independence, safety, or real honour of either being concerned, by the reckless tongues and pens of a few politicians on each side. But such an event is, above all, indefensible, when it is made to arise out of a pure question of international law, which can be decided by reference to known principles and ascertainable rules, carrying in their application nothing but honour to both parties who abide by them. We sincerely trust, whatever the event may be, that our Government will keep within the strict limits of public law, and while demanding nothing but that law for itself, be ready to act fully up to its spirit as well as its letter in dealing with the Americans.

The Commission (alluded to in our last Number) appointed by her Majesty to inquire into the operation of the Acts relating to Transportation and Penal Servitude, and with the manner in which sentences of transportation have been, and are, carried into effect, met for the first time on the 2nd February, and has since continued its sittings twice a week for the examination of witnesses. It is believed that the report will be presented very shortly, and we shall probably notice it at length in our next number. The subject has been abundantly debated in its various aspects.

A special meeting of the National Association for the Promotion of Social Science, was held at Burlington House on the 17th of February, to discuss the expediency of renewing the transportation of criminals, when a resolution, disapproving of the punishment, was moved by Mr. Hastings, and carried by a large majority.

At a meeting of the Council of the Association, on the 19th February, the following resolutions were unanimously agreed to, on the motion of Mr. Hastings, and Mr. Stephen Cave, M.P. :—

“1. That the failure of the present system of convict discipline in England is chiefly due to the short sentences frequently passed on habitual criminals, the want of an efficient probationary stage for convicts under sentence, and of police supervision over discharged prisoners.

“2. That these defects would be remedied by adopting and carrying out the principles of the convict system which has been so successfully administered in Ireland.

"3. That it is not desirable to attempt any return to the old system of transportation, which, apart from the opposition it would provoke from the colonies, would entail heavy and permanent expense on this country, without producing any adequate advantages, or any results which would not be better, as well as more cheaply, obtained by well-regulated convict establishments at home.

"4. That at the same time it is most desirable to encourage the emigration of criminals sentenced to penal servitude, who shall have, by steady industry and labour, whilst in prison, or whilst under probation, saved a sum sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select."

A full report of the transportation debate has been published, and may be obtained at the office of the Association, or at Miss Faithfull's, Princes Street, Hanover Square.

The Law Amendment Society has also been active on the subject, and a report founded on the following resolutions of a special committee appointed to consider the question of convict discipline is now in preparation :—

"1. That it is not desirable to revive the system of transportation, but it is desirable to promote the emigration of criminals sentenced to penal servitude, who shall have by steady industry and labour, whilst in prisons, or whilst under probation, earned a sum sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select.

"2. That the present system of short imprisonments requires revision.

"4. That it is desirable that the convict system should be remodelled on the principle of the convict system now in force in Ireland.

"5. That for this purpose the preliminary imprisonment should be made more severe ; that a system of marks should be established in the second stage of labour ; that intermediate prisons on the plan of Lusk and Smithfield should be organised, and that a strict supervision should be exercised over convicts discharged on tickets of leave, the conditions of which should be stringently enforced.

"6. That a report be drawn up, founded on the resolutions passed by this committee, and that such report, when adopted by the society, be forwarded to the commissioners on convict discipline."

In consequence of some observations addressed to the Society by Mr. Trower, the following resolutions, described as on "Law Reporting," were proposed and agreed to:—

"1. That it is highly expedient that the reported decisions of our superior courts of law in England and Ireland, from the earliest to the present time, should be forthwith expurgated and consolidated, and their undue accumulation for the future be, if possible, prevented.

"2. That to this end a Royal Commission should issue to inquire and report what are the best means of effecting such expurgation and consolidation, and of preventing such an accumulation, and, generally, of improving the present system of law reporting.

"That a deputation of this Society do forthwith wait on the Lord Chancellor, the Chancellor of the Exchequer, and the Home Secretary, to lay the views of this Society before them, and urge upon them the immediate adoption of these resolutions."

It will be observed, however, that these resolutions go much further than their nominal purport, and embrace, in fact, no less a project than the revision of the whole of our unwritten law. The Chancellor, we believe, entertains some such scheme, and perhaps his great energies might be capable of grappling with the difficulties, which, in sober truth, would be enormous. At all events, his lordship seems to have given an attentive hearing to the deputation from the Law Amendment Society, and after dilating on the subject for some time, expressed his desire for a further interview when the plan has become more matured. The deputation, we learn from the papers, consisted of the Right Hon. T. E. Headlam, M.P.; Mr. Daniel, Q.C.; Mr. Thomas Webster; Mr. James Vaughan; Mr. Pulling; Mr. Edgar; and the Secretary, Mr. G. H. Palmer.

The Society has also had before it an interesting paper by Mr. R. R. Torrens, the Registrar-General of South Australia, on the Transfer of Land by Registration of Title, as now in operation in Australia, under the "Torrens system." We have perused this paper with much interest, and commend it to the attention of our readers.

Mr. Serjeant Wrangham expired at his residence, near Bath, on the 10th of March, aged 58 years. The learned serjeant was the eldest son of a distinguished scholar, Archdeacon Wrangham, and himself took a double first degree at Oxford, in 1826. He was called to the Bar in 1829, but he began public life rather as a politician than a lawyer. He was selected, solely on the ground of his academical distinction, by Lord Audley, as his private secretary at the Foreign Office; and he remained, at Lord Aberdeen's request, in the same office during the Duke of Wellington's administration. For a short time, too, he sat in Parliament for Sudbury. He then returned to practice at the Bar, and went the Northern Circuit; but was soon induced to leave it by his increasing Parliamentary practice, at first chiefly in election petitions, but afterwards, and for many years exclusively, in committees on private bills. The present vacant leadership falls by seniority to the lot of Sir W. Alexander, Q.C., one of the benchers of the Middle Temple.

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#### APPOINTMENTS.

MR. E. J. LLOYD, Q.C., of the Chancery Bar, has been appointed Judge of the County Court of Bristol, in the place of Mr. Willes,

deceased. Mr. W. Spooner, of the Common Law Bar, has been appointed Judge of the County Court of Staffordshire, in the room of Sir W. B. Riddell, Bart., removed to the Whitechapel County Court, in the room of Mr. Serjeant Manning, resigned.

Mr. Selfe, Senior Magistrate of the Thames Police Court, has been appointed to the Westminster Court, in the place of Mr. Paynter, resigned; and Mr. Partridge, stipendiary Magistrate at Wolverhampton, has been appointed to succeed Mr. Selfe.

Mr. G. S. Venables, of the Common Law Bar, has been appointed Queen's Counsel.

Sir William J. Alexander, Bart., Q.C., has been appointed Attorney-General to the Prince of Wales, and also one of the Council of his Royal Highness.

Mr. Keene, of the Chancery Bar, has been appointed Deputy-Registrar of Appeals of the Court of Chancery sitting in Bankruptcy, during the absence, on account of illness, of Mr. Vizard.

Mr. W. P. Murray, of the Equity Bar, has been appointed Registrar of the District Court of Bankruptcy, at Manchester.

Mr. John Bullar and Mr. C. Davidson have been appointed Examiners of Titles under the Land Transfer Act.

The Hon. Evelyn Ashley has been appointed Treasurer of the County Court of Dorset, in the room of Edwin Nicholett, deceased.

Mr. Thomas Goodman, of the firm of Lowless, Nelson, and Goodman, has been appointed Deputy Clerk of Assize for the Norfolk Circuit, in the place of the late Mr. Alexander Edgell; and Mr. William Collisson has been appointed Associate to the Circuit, vacant by the promotion of Mr. Goodman.

Mr. E. W. Williamson has been elected Secretary to the Law Institution, in the room of Mr. Maugham, deceased.

IRELAND.—Mr. James Robinson, Q.C., has been appointed to the Chairmanship of the County Tyrone; Mr. Francis Brady, Q.C., to the Chairmanship of the County Roscommon; and Mr. B. C. Lloyd to that of King's County.

AFRICA.—William Hackett, Esq., has been appointed Chief Justice of the Supreme Court of her Majesty's Forts and Settlements, and Assessor to the Native Chiefs within the Protected Territories on the Gold Coast; and Thomas Lewis Ingram, Esq., to be her Majesty's Advocate and Police Magistrate at the Gambia.

BRITISH GUIANA.—Joseph Beaumont, Esq., has been appointed Chief Justice for the colony of British Guiana, in the place of Sir W. Arrindell, C.B.

BRITISH KAFFRARIA.—Thomas Henry Giddy, Esq., has been appointed Master of the Supreme Court of British Kaffraria.

INDIA.—Mr. George Campbell, of the Bengal Civil Service, has been appointed a Judge of the High Court of Calcutta; Mr. W. Holloway, Puisne Judge of the High Court of Judicature at Madras; Mr. J. G. Thompson, Civil and Sessions Judge of Tellicherry; Mr. J. W. Dalrymple, Civil and Sessions Judge of Purneah; Mr. C. F. Montresor, Magistrate of the twenty-four Purgunnahs, and Super-

intendent of the Allipore Gaol ; Mr. F. B. Simpson, Magistrate and Collector of Purneah ; Mr. A. Smith, Magistrate and Deputy Collector of Dinagepore ; Mr. W. H. Henderson, Magistrate and Collector of Mymensing ; Mr. J. Beames, Joint Magistrate and Deputy Collector of Purneah ; Mr. J. D. Gordon, Magistrate and Collector of Maldah ; Mr. W. J. Herschell, and Mr. C. E. Lance, Magistrates and Collectors of Monghyr ; Mr. C. P. Hobhouse, Civil and Sessions Judge of the twenty-four Pergunnahs ; Mr. J. D. Mayne, Assistant Secretary to the Government of Madras, in the Legislative Department ; Mr. H. B. Thompson, Queen's Puisne Judge at Ceylon ; Mr. R. F. Morgan, Queen's Advocate at Ceylon ; Mr. Lawson, confirmed in the Office of District Judge of Colombo ; Mr. M. B. Thornhill, Judge and Sessions Judge of Jounpore ; Mr. H. P. Fane, Judge and Sessions Judge of Mirzapore ; Mr. H. E. Perkins, Judge, and to Preside over the Small Cause Court at Hoshiarpore ; Mr. M. J. M. S. Stewart, Collector and Magistrate of North Canara, Bombay ; Mr. S. St. J. Gordon, Collector and Magistrate of Tanna Presidency ; Mr. N. W. Oliver, Senior Magistrate, and Mr. H. E. Leeke, Acting Second Magistrate, for the Town and Island of Bombay ; Mr. C. E. Bernard, Settlement Officer of Wurdah District ; Mr. D. J. McNeile, Joint Magistrate and Deputy Collector of Jessore ; Mr. V. T. Taylor, Joint Magistrate and Deputy Collector of Rungpore ; Mr. J. S. Drummond, Joint Magistrate and Deputy Collector of Behar ; Mr. H. R. Madocks, Joint Magistrate and Deputy Collector of Nuddea ; Mr. W. Heysham, Deputy Magistrate and Deputy Collector of the twenty-four Pergunnahs, to be also Deputy Collector of Calcutta ; and Mr. F. L. Beaufort to be Civil and Sessional Judge of the twenty-four Pergunnahs.

Mr. J. Bruce Norton has been appointed Advocate General of Madras.

NATAL.—Philip Allen, Esq., has been appointed Resident Magistrate for the colony of Natal.

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### BAR EXAMINATIONS.

THE Council of Legal Education have approved the following rules for the public examination of the students :—

As an inducement to students to propose themselves for examination, studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination ; and, further, the examiners shall select and certify the names of three other students who shall have passed the next best examinations ; and the Inns of Court to which such students belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the Bar. Provided that the examiners shall not be obliged to confer or grant any studentship or certificate, un-

less they shall be of opinion that the examination of the students they select has been such as entitles them thereto. At every call to the Bar, those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day. No students shall be eligible to be called to the Bar who shall not either have attended during one whole year the lectures of two of the readers, or have satisfactorily passed a public examination.

The examination will be held in Trinity term next, to which a student of any of the Inns of Court, who is desirous of becoming a candidate for a studentship or honours, or of obtaining a certificate of fitness for being called to the Bar, will be admissible.

Each student proposing to submit himself for examination will be required to enter his name at the treasurer's office of the Inn of Court to which he belongs, on or before Tuesday, May 12, next; and he will further be required to state in writing whether his object in offering himself for examination is to compete for a studentship, or other honourable distinction, or whether he is merely desirous of obtaining a certificate preliminary to a call of the Bar.

The examination will commence on Tuesday, May 19, next, and will be continued on the Wednesday and Thursday following. It will take place in the benchers' reading room, at Lincoln's Inn, and the doors will be closed ten minutes after the time appointed for the commencement of the examination.

The examination by printed questions will be conducted in the following order:—

Tuesday morning, May 19, at half-past nine, on Constitutional Law and Legal History; in the afternoon, at half-past one, on Equity.

Wednesday morning, May 20, at half-past nine, on Common Law; in the afternoon, at half-past one, on the Law of Real Property, &c.

Thursday morning, May 21, at half-past nine, on Jurisprudence and the Civil Law; in the afternoon, at half-past one, a paper will be given to the students, including questions bearing upon all the foregoing subjects of examination.

The oral examination will be conducted in the same order, during the same hours, and on the same subjects, as those already marked out for the examination by printed questions, except that on Thursday afternoon there will be no oral examination.

The oral examination of each student will be conducted apart from the other students, and the character of that examination will vary according as the student is a candidate for honours or a studentship, or desires simply to obtain a certificate.

The oral examination and printed questions will be founded on the books below mentioned, regard being had, however, to the particular object with a view to which the student presents himself for examination.

In determining the question whether a student has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners will principally have regard to the general knowledge of law and jurisprudence which he has displayed. A student may present himself at any number of examinations until he shall have obtained a certificate. Any student who shall obtain a certificate may present himself a second time for examination as a candidate for the studentship, but only at one of the three examinations immediately succeeding that at which he shall have obtained such certificate, provided that if any student so presenting himself shall not succeed in obtaining the studentship his name shall not appear in the list. Students who have kept more than eleven terms shall not be admitted to an examination for the studentship.

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#### EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Hilary Term, 1863.*

At the examination of Candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—

Mr. Cartmell Harrison, aged 21 ; Mr. James Huntley John, aged 24 ; Mr. A. B. D. Sword, aged 21 ; Mr. John Woodcock, aged 21 ; Mr. Albert R. Rollit, aged 21.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—

To Mr. Harrison, the prize of the Honourable Society of Clifford's Inn ; to Mr. John, the prize of the Honourable Society of Clement's Inn ; to Mr. Sword, Mr. Woodcock, and Mr. Rollit, each one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitled them to commendation :—

Thomas Beaumont, aged 21 ; Henry Cadman, aged 21 ; Thomas D. Goodman, aged 23 ; Robert W. Griffith, B.A., aged 25 ; Robert F. Loosemore, aged 22 ; John Henry Waeick, aged 22 ; James Webber, Junr., aged 24 ; and Frederick A. Wilcox, aged 25.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examinations were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had been under the age of 26 :—

Joseph F. Swann, aged 29 ; Richard Austen Dale, aged 27 ; Thomas Goffey, aged 28 ; Alfred T. Cox, aged 31.

The number of candidates examined was 106 ; of these ninety-eight were passed, and eight postponed.



## *Necrology.*

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### *January.*

- 2nd. MURRAY, RICHARD HENRY, Esq., Barrister, aged 26.  
 12th. BURNS, SIR ROBERT EASTON, Puisne Judge of the Queen's Bench, Upper Canada.  
 25th. VIVEASH, ORIEL, Esq., Barrister, aged 68.  
 30th. ROBINSON, SIR JOHN BEVERLEY, Bart., B.C., late President of the Court of Appeal, and formerly Chief Justice of Upper Canada.  
 31st. NICHOLETTS, EDWIN, Esq., Solicitor, and Treasurer of County Courts.

### *February.*

- 2nd. WILLES, WILLIAM HENRY, Esq., Judge of the Bristol County Court, aged 40.  
 3rd. FRANCIS JOHN, Esq., Solicitor, aged 75.  
 3rd. NEWBON, JAMES SHELTON, Esq., Solicitor, aged 56.  
 6th. FISHER, FRANCIS, Esq., Barrister, aged 53.  
 6th. HUNT, WILLIAM, Esq., Solicitor, aged 51.  
 7th. GURNEY, WILLIAM CORYNDEN, Esq., Barrister, aged 32.  
 14th. RENNALLS, WILLIAM RODEN, Esq., formerly Judge of the Court of Admiralty, in Jamaica, aged 73.  
 21st. CHITTY, THOMAS, Esq., Barrister, aged 47.  
 22nd. EDGELL, ALEXANDER, Esq., Solicitor.  
 23rd. WATSON, ROBERT WILLIAM, Esq., Solicitor.  
 28th. KNAPP, CHARLES, Esq., Barrister, aged 48.

### *March.*

- 2nd. O'MEAGHER, WILLIAM, Esq., Barrister.  
 8th. MACKENZIE, WILLIAM, Esq., Solicitor, aged 56.  
 9th. WARNER, ISAAC, Esq., Solicitor, aged 48.  
 10th. WRANGHAM, DIGBY CAYLEY, Esq., Serjeant-at-Law, aged 58.  
 11th. CLARE, AMBROSE, Esq., Solicitor.  
 11th. ROBSON, JAMES PICKERING, Esq., Solicitor, aged 48.  
 14th. KENNEDY, REYNOLDS, Esq., Solicitor, aged 23.

- 19th. WHITE, J. MEADOWS, Esq., Solicitor, aged 64.  
20th. ROPER, SIR HENRY, formerly Chief Justice of Bombay,  
aged 63.  
24th. LOW, ARCHIBALD, Esq., Solicitor, aged 72.  
27th. BROOKSBANK, James, Esq., Barrister, aged 46.

*April.*

- 3rd. LAKE, HENRY, Esq., Solicitor.  
3rd. STRANG, ROBERT, Esq., Solicitor.  
19th. SWANSTON, CLEMENT T., Esq., Q.C., aged 80.  
20th. PAYNTER, THOMAS G., Esq., late one of Metropolitan Police  
Magistrates, aged 81.
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## List of New Publications.

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**Baker**—The Laws relating to Burials ; with Notes, Forms, and Practical Instruction. By J. Baker, Esq., Barrister. Third Edition. Including the Statutes passed during the last Session of Parliament, and the Scotch and Irish Acts. 12mo., 7s. 6d. cloth.

**Bateman**—The General Highway Acts. Second Edition. By W. N. Welsby, Esq. 12mo., 9s. cloth.

**Chitty**—A Treatise on the Law of Contracts, and upon the Defences to Actions thereon. Seventh Edition. By J. A. Russell, Esq., Barrister. Royal 8vo., 32s. cloth.

**Coote and Tristram**—The Practice of the Court of Probate in Common Form Business ; also a Treatise on the Practice of the Court in Contentious Business. By H. C. Coote, Proctor, and Dr. T. H. Tristram. Fourth Edition. 8vo., 21s. cloth.

**Day**—The Common Law Procedure Acts and other Statutes relating to the Practice of the Superior Courts of Common Law, and the Rules of Court ; with Notes. By J. C. F. S. Day, Esq., Barrister. Second Edition. Post 8vo., 15s. cloth.

**Edwards**—Shall we Register Title ? or, the Objections to Land and Title Registry Stated and Answered. By T. Edwards, Esq., Barrister. 12mo., 4s. 6d. cloth.

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INDEX TO VOL. XV.  
OF THE  
*Law Magazine and Law Review.*

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- Accord of Satisfaction, 51.  
Administration to Foreigners dying in England, 71.  
American Secession and State Rights, 318.  
Case of the Alabama, 112.  
Criminal Procedure.—Public Prosecutors, 347.  
Discipline of the Bar, 1.  
Friedrich Carl Von Savigny, 76.  
Judicial Statistics (1861), 147.  
Law of Libel, 193.  
Lord Mackenzie on Roman Law, 131.  
May's Constitutional History of England, 56.  
Rights, Disabilities, and Usages of the Ancient English Peasantry.—Part VI., Taxation, Purveyance, and other Grievances, 42.—Part VII., The Parliamentary Regulation of Labour in the Fourteenth and Fifteenth Centuries, 292.  
Scientific Evidence, 300.





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No. XXX.

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ART. I.—THE LAW OF LIBEL, AS APPLIED TO  
PUBLIC DISCUSSION.

*Foster and Finlason's Reports.* Vol. II., containing *Turnbull* versus *Bird*; and *Paris* versus *Levy*. Vol. III., Part 3, containing *Campbell* versus *Spottiswoode*.

PUBLIC opinion is the very life-blood of a free State; and it exists and circulates by freedom of discussion. The free expression of opinion is, in fact, the very soul of freedom; it is that which is the essential distinction of a free country; its presence is liberty, its absence is slavery; the want of it produces the stagnation of mind, and prostration of thought, which mark the moral death of a nation, and are the sure forerunners or the worst results of tyranny. On the other hand, freedom of discussion, as it is a well-spring of life to a nation, is at once the essence of the first blessing, freedom; so it is at once the source and the security of every other. It is by means of this that all the institutions of a free country are brought and kept in harmony with public opinion. This harmony is, in a free country, of the first necessity. Thus Burke declared the true end of the Legislature to be to follow the general sense of the community (*Works*, vol. i. p. 216).

To effect this harmony, in a political sense, is the object of representative institutions and a free Parliament. To effect it as regards the administration of justice, is the object of trial by jury. It is the object, indeed, of all our popular institutions, but, above all, by freedom of discussion and the force of public opinion. There are two great means or forms of the expression of opinion; it may be by oral addresses or by public writings. Before the invention of printing, it was, of course, only in the former, and it was in the face of public assemblies that the right of free discussion was asserted—a noisy and exciting form of its exercise, not favourable to calm consideration, appealing rather to the feeling than the intellect, and apt to lead, in fact, to displays of physical rather than to intellectual force. Moreover, after all, public speaking is but a laborious and limited means for the diffusion of ideas through a whole nation, and no wonder that when their circulation was confined thereto they travelled somewhat slowly. Printing infinitely enlarged the field for the diffusion of ideas and extended the area of public discussion.

The invention of printing, of course, threw the expression of public opinion into the peaceful form of an appeal to intelligence and public opinion. The three centuries which have elapsed since that great event might, perhaps, be divided into the age of the book, of the pamphlet, and of the newspaper. The comparatively cumbrous form of the book prevailed in the 16th century; the lighter pamphlet succeeded in the 17th; the newspaper—the last and greatest development of divided intelligence—was the product of the 18th century. The result of its rise was an immediate increase in the publication of books. Mr. Buckle observes that in England the marked increase in the number of books took place during the latter part of the 18th century, and particularly after 1756. He adds, that between 1753 and 1792 the circulation of newspapers more than doubled (*History of Civilization*, vol. i. p. 399, note 239). Since that era the discussion of public matters has fallen to the newspaper press (including all

periodical journalism), whose very object and vocation is the expression of public opinion on public men, and public measures, and public matters in general.

The gifted author of the *History of Civilization* ascribes all improvements and the abolition of all abuses to the progress of public opinion by the influence of the press. Statesmen, he says, are only the creatures of the age, not its creators. "These measures are the results of social progress, not the cause of it."

"No great political improvement, no great reform, either legislative or executive, has ever been originated in any country by its rulers. The first suggesters of such steps have invariably been bold and able thinkers, who have discerned the abuse, denounced it, and pointed out how it is to be remedied."—*Hist. Civiliz.*, vol. i. p. 28.

To denounce public vices or abuses without denouncing those who practise them, uphold them, or profit by them, and have an interest in maintaining them, is practically impossible, and there is a natural and intimate association between the conduct and the character of public men, often an equally close connection between their action and opinion. Hence it is, that from the first rise of the newspaper press, to which has gradually and naturally fallen the expression of public opinion, it has been in the habit of assailing public men. Mr. Buckle in his *History of Civilization* mentions it as an indication of the rising independence of the press that in 1762 (just a century ago) "we find the first instance of a popular writer attacking public men by name." And then began what he calls the "'feud' between literature and rank," which, he says, "we continued to this day," (Vol. i. p. 397) but as to which we say nothing.

So far from persons and their actions being excluded from the scope of free discussion, Burke actually adduces, as a bad trait in the character of bad citizens, an indifference to the merits or demerits of public men. "They see," he says, "no merit in the good, and no fault in the vicious management

of public affairs. They see no merit or demerit in any man, or any action, or any political principle." (*Reflections on French Revolution.*) Here this great writer and great teacher of political wisdom connects together public men, their principles, their actions, as equally fit subjects of public discussion; for he denounces as evil, and as a mark of bad citizen, an indifference or disregard thereto. And in another part of the same immortal work he explains with philosophical acumen the *rationale* of such restraints on public men, or on the people themselves, as law and public opinion each in their respective spheres supply. He says:—

"Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should be frequently thwarted, their will controlled, and their passions brought into subjection. This can only be done by a power out of themselves, and not, in the exercise of its functions, subject to that will, and to those passions which it is its office to bridle and to restrain."—*Ibid.*

In its highest human sense this, of course, refers to law: but then, as all lawyers know, the province of law is comparatively restricted: and there is a vast field of public action in which the law is powerless, and the only restraint is public opinion.

And in the same spirit Burke rather encourages the denunciation of false pretexes of right under which all wrongs are committed, rather than the general abuse of the institutions under cover and under colour of which they are perpetrated. "History," he says, "consists for the most part of the miseries brought upon the world by pride, hypocrisy, ungoverned zeal, which shake the public with their troublous storms. These vices are the causes of those storms. Religion, morals, laws, privileges, rights of men, are the pretexes. The pretexes are always found in some specious appearances of real good. You would not secure men by rooting out of the mind the principles to which these

fraudulent pretexts apply? As these are the pretexts, so the ordinary actors and instruments in great public evils are magistrates, senates, national assemblies, judges, ministers. You would not cure the evil by resolving that there should be no more monarchs, nor ministers of state, nor magistrates. A certain quantum of power must always exist in the community, &c." (*Reflections*, &c.) The drift of his argument is, attack the particular evils, or abuses, or faults, or vices of which you complain in public men, and do not confound with them the institutions themselves. In this sense, public discussion, as to public men and their actions, is, it is obvious, a great safety-valve for the State—a conservative and protective power, the tendency of which is to denounce the errors or vices of our public men, and the abuses of our public institutions, and so to uphold the institutions themselves.

The two forms of free discussion, in the press and at public meetings, have always been united. The Government once attempted to suppress it by enacting a series of laws which, says Mr. Buckle, were intended to put an end to the free discussion of political questions and stifle the spirit of inquiry. These laws, he said, if the energy of the nation had not prevented their being properly enforced, would have destroyed every vestige of popular liberty, or else have provoked a general rebellion. Lord Campbell (*Lives of the Chancellors*, vol. vi. p. 449) says that if the laws passed in 1794 had been enforced, the only chance of escaping servitude would have been revolution; and Lord Brougham calls it "an escape from proscription and from arbitrary power." Now these laws were passed both against the press and against public meetings.

There is, it will be observed, a close connexion between the right of public discussion and the freedom of the press. They are, in short, two forms of exercise of the same right, viz., the right of public discussion—one in the form of speech, the other in the form of print. The latter is infinitely

the more important, as it is capable of a greater degree of diffusion and an infinitely wider range of operation. The great author we have already quoted thus alludes to the latter:—

“We may form some idea of the magnitude of the crisis by considering the steps which were actually taken against the two most important of all our institutions, viz., the freedom of the public press, and the right of assembling in meetings for the purpose of public discussion. These are in a public point of view the two most striking peculiarities which distinguish us from every other European people. So long as they are preserved intact, and so long as they are fearlessly and frequently employed, there will always be ample protection against those encroachments on the part of Government, which cannot be too jealously watched, and to which the freest country is liable. To this it may be added that these institutions possess other advantages of the highest order. By encouraging political discussion they increase the amount of intellect brought to bear upon the political business of the country. They cause large classes of men to exercise faculties which would otherwise lie dormant, &c.”—*Hist. Civiliz.*, vol. i. p. 443.

It is obvious that this great right of public discussion, whether oral or written, cannot be restricted to the mere discussion of abstract questions of principle or of policy, but must, of necessity, embrace all that comes within the sphere of public life—the acts, the words, the conduct of public men, and even in some cases their private character, in so far as it tends to throw a light upon their fitness for public offices or their exercise of public functions. Nor, again, can the right be restricted to the mere expression of opinion upon undoubted and admitted facts; or mere criticism upon published works; or the mere character of public acts in regard to their own inherent nature or quality apart from extrinsic circumstances which might, if known, give them another character or quality from that which would be apparent on the face of the matter. There must be power to draw inferences “of fact,” and as there is always more or less

of opinion in the drawing of inferences, and persons may as honestly differ in regard to inferences or opinions, it may often happen that a public writer may honestly draw erroneous inferences, that is, inferences which others would deem erroneous, and even unfair ; just as it may often happen that he may express opinions on undoubted facts which others may deem erroneous or even most uncharitable and unjust. The right of free discussion must, it is obvious, embrace, to some extent, disputed facts as well as disputed opinions. Indeed, all opinions, save such as are purely abstract, and bearing little, if at all, on the discussion of public events, depend more or less upon the facts. Alter the facts a little, and you necessarily alter the opinion ; alter, therefore, your view of the facts, and you necessarily alter your opinion of the matter. To preclude a public writer or speaker, therefore, from discussing facts, would be to exclude from this right of public discussion its most important province, and that on which all else must depend ; and to compel him to discuss matters on a basis of supposed facts conceded by those who take a different view, would be, in truth, in many cases, to prevent all discussion at all, because upon that very statement of facts the whole difference of opinion may ultimately turn.

It is, again, obvious, that this right of public discussion, oral or written, must, in a vast multitude of cases, probably the great majority, more or less affect or involve questions of personal character. Questions of character must of necessity be personal, whether they regard matters public or private in their nature. And matters even private in their nature may affect a man's public character ; as matters purely public may and must affect his personal character, in so far as they regard the character and quality of his own public acts. And it is obvious that there are a vast variety of cases in which it is not possible to discuss a matter of public interest without affecting personal character. The fitness of a man for his office, for instance, may involve many matters of character. The legal justice of a verdict of acquittal upon a serious

charge may be of immense public interest, and as fit to be discussed as a verdict of guilty, and of course cannot possibly be discussed without involving indirectly the question of the guilt or innocence of the accused. Even the discussion of a published work must more or less affect the personal character of its author; for, to say of a man that he has written a work immodest or immoral, is to reflect strongly on his personal character. It is an indirect reflection upon it, it is true, but not the less a reflection.

So again, and above all, as to that most important and most doubtful portion of the field for further discussion, and as to which the most difficult questions arise—the public acts of public men. It is manifest that these are, above all other matters, proper subjects for public discussion, more especially in that vast range of cases in which there is no remedy for miscarriage, or even for misconduct, short of that which the law deems criminal or punishable. There are, it is well known, many classes of cases, indeed, including most offices or functions of a public nature, and especially such as are judicial or municipal, in which there is no remedy, but that which is penal, and generally in the way of removal. The law deems, in these cases, the free and unfettered discharge of the public duties so important, that it will not allow the party to be harassed by action, and confers entire immunity except on proof of wilful delinquency.

It is obvious that these are precisely the class of cases in which freedom of public discussion is most important, both because there may be a great degree of misconduct which may not be deemed legal or criminal; and because there may be a great deal even of such misconduct without sufficient legal proof; or the means, or power, or disposition in the party grieved, to promote legal proceedings. And every day shows that, strictly within the scope of a public officer's jurisdiction or lawful power, there may be, whether with or without bad motive, a vast deal of injustice, oppression, and abuse. It is just here that public discussion is most important,



because practically there is no other remedy. And, indeed, this is the proper and peculiar, though not, perhaps, the exclusive field for public discussion, as to cases in which either there is not, or from circumstances there cannot be, or, at all events, in the particular case will not be, any legal remedy. Thus it is that public discussion comes, so to speak, in aid of the law, and is not to be viewed as opposed to, but rather co-operating with legal justice.

From reasons of public policy the law, in many circumstances, can give no direct redress. Thus, there are a large number of cases, such as most summary convictions, in which there is, so far as the case turns on the facts, no appeal; and thus men practically may be wrongly and unjustly fined and imprisoned without redress. There are reasons of public policy for which the law allows great latitude to public officers, and often allows magistrates to be absolute if not arbitrary. The law, however, from reasons of the like public policy, allows freedom of discussion in these cases, and thus recognises the right of public discussion as a valuable aid to public justice, for the sake of their common object, the public interest. It allows the public officer full freedom, unfettered by dread of action, in the exercise of his functions; so it allows the public writer full freedom, unfettered by that dread, in the exercise of his functions. In each case there is a privilege in the true sense of the term—that is, an immunity from legal liability in the honest exercise of a public right. Thus the legal right of the public officer is to discharge his functions according to his own opinion and judgment, however he may err therein. It is the right of the public writer to comment freely on these acts, however he may err therein; that is, each is protected from liability for mere error within the scope of his proper power and province. So far we might reason safely, *à priori*, from the admitted existence of a right of free discussion on public matters. And we might even go a step farther, and say, that this right must of necessity, as it clearly must in many cases, extend to the grounds, the reasons,

or the causes of a public act; so in some cases, even to the object, the motive, or the animus. For in many cases the whole character of an act depends entirely or mainly on its object, whether the aim of a movement be to reject a ministry or displace a policy: whether the motive or real intention of an act was to do right or to destroy an adversary; whether, in short, a public officer has acted honestly, is very often vital to the inquiry.

It is obvious that in these classes and cases (which are those in which the exercise of the right of free discussion of course raises questions of most difficulty), personal character is more nearly and directly affected than in any other. But it is equally obvious that it is only a question of degree; for, as we have seen, there is an implied and indirect reflection on a man's character in saying that he has written books of an immodest or immoral tendency, and in that kind of case it would very little, if at all, heighten the imputation to say he did so from a bad motive, seeing that the act itself was so bad; or, again, as it is a principle of law that every reader must be taken to contemplate the natural result of his own act, it would be safe to infer in such a case that the publication was from a pleasure in diffusing bad ideas, or for the sake of profit, or what not. When the act itself is morally bad, and there is no dispute about the fact—there is little scope for reflection upon motive. The question of greatest difficulty as to the right of public discussion, arises where the act *per se* is either indifferent, or even, on the face of it, lawful and right, in the discharge of some public duty, or, at all events, the public exercise of some legal right. The difficulty in these cases arises from the extreme importance of allowing freedom of discussion as to the honesty of the acts of public men; on the other hand, the importance of protecting men from groundless imputations upon character, while character must necessarily in these cases be closely and directly involved. The problem which the law has to solve in such cases is one, it is obvious, of extreme delicacy and difficulty—the drawing

of a line between freedom and licence; between immunity in discussion and immunity for defamation. Difficult, however, as the problem may be, it must be obvious, even *à priori*, that it would only be solved by a steady adherence to the same principles which govern the law on the subject in cases of less difficulty. The axioms of Euclid form the basis of the most complicated operations in mathematics, and by these combinations solve the most difficult problems. Thus it is that the law develops itself logically from the easy premises of first principles, and, from their happy combination, elucidates the most perplexing legal difficulties.

And thus, reasoning *à priori*, from the admitted exercise of a right of free discussion upon public matters, we might, apart from positive authority, deduce from legal principles and analogies, at once the legal limits of that right, and the existence of a privilege (or immunity from legal liability) in its honest exercise. As regards the first—the legal limits of the right—every public right has its limit, and to define all our rights is the great province of law. The right of free discussion, great and valuable as it is, has its legal limits, and they are in substance the same whether the discussion be oral or written—at public meetings or in the public press. There is a great legal principle that no right is ever allowed to go beyond the occasion, or the object or cause for which it is allowed. Now the object or cause for which the law allows of public discussion, is the public interest in regard to public matters. Hence it is obvious there can be no right of public discussion as to matters not public; nor any right of public discussion (in the only sense in which the phrase “right” has any real meaning, *i.e.*, as excusing defamation)—to any extent beyond what is necessary for the discussion of what is public.

All law is a balance of evils and advantages, and even our natural rights are to some extent sacrificed for the sake of society. Thus it is with the sacred right of personal liberty; and one man may in the exercise of the public right of prosecution, without legal liability, cause another to be arrested

without any reasonable or probable cause, so that it is not a wilfully wrongful act. So it is as to the security of personal character—it is so far sacrificed by the law to what the law deems of higher importance—that a man cannot resort to law for its vindication against defamation when it has arisen in the exercise of the public right of free discussion. It is a general principle that an act, otherwise unlawful and injurious, is excused when it is in the exercise of a public right the law recognises and encourages. Thus it is with the right of prosecution: thus it is with the right of free discussion. An injury done in the exercise of those rights—not wilfully—would not, we should say, *à priori*, be deemed actionable in law.

These instances are not inconsistencies, nor even exceptions, in our law. They are rather illustrations of a general principle which pervades it. The law (or the government in general, of which it is only a part), which is framed for the general welfare of the community, does not undertake to provide remedial or vindicatory measures in all cases of wrong or injury, but only so far as is deemed by the law and constitution of the country necessary for the good of society. On the contrary, in a free state, the object of law and government is, as much as possible, to allow of individual liberty, and only to fetter or confine it so far as is essential or desirable for the existence or general benefit of society. Hence, so far from its being, *à priori*, to be laid down that the expression of opinion on public matters, even when defamatory, *i.e.*, prejudicial to an individual, should be legally punishable, *primâ facie*, or unless in cases of wilful injury, the very reverse would be the presumption, and the injured individual would be simply left to the same or similar means for his vindication. For this would be an analogy with the ordinary principle of our law, which is to grant immunity for any casual injury to an individual in the exercise of a public right, in the free exercise of which the public has an interest.

But it is an invariable rule that the law never allows one

legal right to encroach upon another, except so far as may be necessary. Thus it is as regards liberty; and so a private person may not give another into custody, save in cases of felony, upon just and reasonable ground of suspicion (or in one or two exceptional cases of actual necessity, as, to prevent an impending breach of the peace, or the like), because he may have recourse to a constable or a magistrate, who have a larger measure of immunity. So as to the right of prosecution,—a man being only protected by it within the limit of what relates to or arises out of it, and not as to matters quite extraneous; as, for instance, a charge of adultery, in the case of a charge of felony. From this great principle it would follow that the right of free discussion could only extend to matters which are fit subjects for public discussion, and such matters as may fairly arise out of what already is so. The ratio for determining this must of course vary in each class of cases, but the principle is the same. Thus, in a case of a book or other publication, it must be what arises fairly out of the publication itself; in the case of a public act, the nature of the act and whatever may fairly arise out of the surrounding circumstances known or admitted about it.

There being, it is obvious, some ground for such immunity in the right of public discussion in general, there are numerous and obvious arguments in support of a peculiar immunity to the press in the discussion of public matters. In the first place, even assuming some degree of honest but erroneous imputation, it is public, and the object of it knows of it, and can at once answer it; whereas, the worst mischief of defamation is when it is secret, and the object of it, not knowing of it, may be fatally injured without being aware of the injury, nor having an opportunity of preventing it.\*

Next, the press itself, the medium of the defamation, presents the most efficient means of refutation—prompt, immediate, and as widely diffused as the defamation itself.

\* See some remarkable observations by Coleridge on secret defamation, *Biog. Lit.* vol. i. p. 192.

Further, the premises on which the imputation is made are almost always—in all cases in which it is protected—put before the public, so that very often it carries with it its own refutation; and, at all events, people have an opportunity of forming their own judgment, and very likely it will be to a great degree left in doubt, if not altogether in favour of the accused. Lastly, if the accused is not afforded a fair opportunity of answering the imputation, it will be evidence of malice, and make the writer liable.

No peculiar immunity, however, is necessary for public writers in newspapers. They only claim the benefit of the same right of public discussion which is allowed to all. And such are the legal limits of the right which suggest themselves, reasoning, *à priori*, from general principles.

But next, such being the limits of the right, there is another legal principle upon which, *à priori*, we might safely infer the existence of a privilege in its honest exercise; that is, its honest exercise within the legal limits of the right as already pointed out. The two questions are quite distinct. Within the strictest limits of the right there may be an exercise of it either honest or dishonest. And there is a great twofold legal principle that the law never allows any exemption of immunity in the dishonest exercise of a public right; and that it always allows such an immunity or privilege in the honest exercise of a right in the free exercise of which the public have an interest. Thus it is in the right of prosecution: within its limits there is no legal liability, however erroneous and injurious, so that it is not wilfully or without any reasonable or rational ground, or with wilful falsehood, so as to show what the law deems evidence of a bad motive.

This is what the law denominates privilege, and confers in every case of the honest exercise of a public right of which it deems the free exercise to be of public interest. The right of publication is one instance, that of free discussion is another; the exercise of any judicial function is another. The very nature of the right of free discussion necessarily

includes it within this principle. For, as we have seen, it is only allowed at all for the sake of securing freedom of discussion, that being of such vital nature in a free State. It is, in fact, the right of free discussion; and, of course, it is of its essence that it should be free. But free it cannot be if hampered, within the limits of the legal right, by the dread of being harassed by action for any honest though erroneous imputation, which in law may amount to defamation. If the law deemed this consistent with the free exercise of a right, it would not protect prosecutors or public officers from it. As it does not deem it consistent with freedom, it protects public writers from it, and does so by what we call privilege.

It would, it is admitted, be a public evil if men were deterred from the fair exercise of the right of free discussion on public matters. But they must be so deterred unless there is a privilege in the discussion of such matters, that is an immunity for honest though erroneous defamation in the course of such discussion, and for criminatory imputations, by way of inference, from public facts, whether acts or words, with all the concurrent circumstances of the case; if not so extravagant and obviously unfounded as to show a reckless and malicious spirit.

If there were no such privilege or immunity there would be a great mischief and a monstrous anomaly. The basis of all such privileges as are allowed is public interest; or, as the judges sometimes express it, "the ordinary exigencies of society." On that broad general principle all privileges are rested: and on that ground privileges in even private matters are allowed; in some cases, in which persons are, it is manifest, less likely to be disinterested or dispassionate than in matters where they are personally not concerned, and the interests of third persons or of the public are affected. It would be unreasonable if in these latter cases there were no protection, and if in every case the sole question for the jury were, "Is this true?" or, "Is it in *your* opinion fair, or well founded?"

It is an entire error to confound privilege, in the sense in which it is used by the law of libel, with *privilegium*. This is

to be misled by a mere resemblance of words arising from the poverty of language. The proper idea of *privilegium* is a special provision for a particular case out of the province of general law. It is in this sense which is adverted to by Burke, when he says, "It is against all genuine principles of jurisprudence to draw a principle from a law made in a special case, and regarding an individual person. *Privilegium non transit in exemplum*" (*Reflections on French Revolution*). But the same great writer uses the word privilege in quite the opposite sense, as associated with public rights and liberties. "We have," he says, "a people inheriting privileges and liberties" (*ibid.*). And again, "We receive, we hold, we transmit our government and our privileges" (*ibid.*). And in this sense, the word is used by our text writers and judges, in the want of any better, (or indeed of any other,) to express an immunity in the exercise of some legal and public right; both the right and the immunity being always grounded on principles of public policy, and on a regard to the public interest or what is called "the reasonable exigencies of society." This is the basis on which it is founded even as regards private matters.

The true nature of privilege, in the legal sense in which it is used in the law of libel, as it is in other departments of our law, is an indulgence or immunity to men in the honest exercise of a right, in the free exercise of which the public have an interest. The distinction is, in the allowance or disallowance of any indulgence or immunity to its honest exercise. There is no such indulgence in the exercise of a mere private right, in the free exercise of which the public has no interest; as the right of property; nor even the right of speech or publication, when no public interest is involved. However honest the error, the man must suffer. It is not so when the public interest is concerned. Thus, to the extent to which that interest is concerned, there is this indulgence and immunity to honest error. Otherwise a free and honest exercise of the right would be fettered by the fear of legal



liability. In such cases the law allows immunity, except in cases of wilful wrong. So it is as to prosecution or actions. So it is as to the right of free discussion.

The true meaning of the word privilege, when used in the law (except in such instances as judges, or jurors, &c.), is not a personal exemption arising from any particular position or relation, but an immunity or protection in the exercise of a private or public right. That is, it is not a right, but as collateral or incidental to the exercise of a right. In other words, it is an excuse or immunity for what would otherwise be legally punishable or actionable. Thus there is no right to publish libels. But there is no libel, that is, no defamation legally punishable, when it is lawfully excusable. In other words, where there is a right, in the exercise of which there is a privilege or excuse to publish defamatory imputations. This is the privilege of protection enjoyed by the public press, in common with the public, in the public discussion of public topics. There is a right of free discussion, and, in the exercise of it, a privilege or excuse for defamation.

If it were not for this privilege, the freedom of discussion would be placed absolutely in the power of some particular class, either the class to which belong the judges, or the jury.

It is necessary that the exercise of the right of free discussion should not be placed absolutely in the power of any class. The institution of trial by jury, coupled with Mr. Fox's Libel Act, secures it absolutely from the power of the Crown or of the aristocracy. The law of privilege alone can secure it from perhaps a worse evil still—the absolute power of the people. The most profound thinkers in every age, from Aristotle downwards to our own time, have warned us against allowing the people absolute power; and Dr. Arnold, as Burke had done before him, while asserting the necessity that the people should be paramount, also asserts that (for that very reason) they should not be absolute; that is, that they shall be subject to some controlling and restraining power. It is

manifest that, save within the comparatively restricted domain of law, this restraint can only be applied by the force of public opinion exerted in the right of free discussion, in which thought and intellect must address and enlighten the mind of the nation.

But, as Burke himself points out, the efficacy of any restraining power depends entirely upon its not being subject absolutely to the control of the very power it is designed to restrain: that is, in this case, the people. If, however, the law of libel placed public writers entirely at the mercy of the jury, then the right of free discussion would be under the absolute control of the people; and the expression of public opinion would be merely the expression of popular opinions. The jury have already by law the power of protecting a public writer by saying what is *not* a libel. If they had also the power of saying always what was a libel, they would be arbitrary. But there is no libel where there is a lawful excuse. There is a lawful excuse in the honest exercise of a public right with a free discussion; and the question of lawful excuse is, in the first instance, a question of lawful excuse for the judge.

Thus a public writer is secured, by this doctrine of privilege or lawful excuse, from being absolutely in the power of the jury or the people. The jury have absolute power to say what is not a libel, but they have not the like absolute power to say what is, for they have not the power of saying what is a lawful excuse. Thus, then, if a public writer attack any popular body, as a jury, or a vestry, or an electoral body, or any popular idol, a demagogue, a public charlatan, a pretender and impostor, he is protected from the popular prejudices and passions, just as surely as he is, in the case of any assault upon aristocratic prejudices or feelings, from the power of the aristocratic classes; and he is safe unless he has made attacks which are so excessive that the judge feels bound to declare that the jury may find he has been legally culpable. All this, however, it will be seen, depends entirely on the law of

privilege, for otherwise, in every case, the whole question would be absolutely for the jury.

To restrict the right of free discussion within the limit of what the jury may deem absolutely "fair" in the sense of the fairness of the censures or strictures themselves, assuming a theme within the scope of the subject-matter of discussion, would be to enslave public opinion, and confine it to the limits of what the jury may happen to approve of. For to expect a jury to be able to draw a line between what they approve of, and what they think fair, as to opinions they disapprove of, is what no one at all acquainted with trial by jury will be so deluded as to dream of. The result would be to measure the right of free discussion on public topics by the mere good pleasure of a portion of the community—very large and very numerous—perhaps representing a numerical majority, but by no means representing the intellect, information, and intelligence of the nation—a class most exposed to passion and prejudice, and (a very large portion of them) to ignorance; and likely to be least disposed to be tolerant to the opinion of a minority. Yet it is the great object of really free institutions to protect a minority from tyranny.

To refer it to the jury whether the comments are fair, would be to place public writers in a far worse position than to deprive them of all protection; and tell them that, fair or unfair, their comments, if criminatory, will be deemed defamatory. For then, at all events, they would be equally contrary on all occasions, and thus, if their energies were deadened by perpetual dread of legal liability, at least they could not be tempted to become servile to the strong influence of the people. But to tell them that they may have an immunity if they manage to hit the popular feeling so far as to get a jury to say their observations are "fair," is to tempt them to pander to the popular feelings, and thus tend to foster the worst vices of the press. It is of the last importance that the press should be independent of all power save that of the law, and of all popular influences which may

prevent its performing its highest function—the exposure of popular delusions and the false pretences of popular impostors—and, above all, the vices of the people themselves, which have no censors but the press.

And this would be pre-eminently the case when it was his duty to impugn popular decisions, as, for example, to impeach the verdict of a jury, or the vote of a public body. Such acts of the people or of popular bodies may be grave offences against honesty and decency, and there is no other remedy than the expression of public opinion in the press. In their political or their judicial functions, the people are not responsible, save to public opinion. The verdict of a jury may be atrocious; but the writ of attaint is gone, and there is no legal remedy. An atrocious criminal may escape through popular prejudices or passions; such cases have occurred within living memory, just as within living memory judicial murders have been perpetrated. The days for the latter are gone, and juries are not so likely to sin in the way of rash convictions, as weak or iniquitous acquittals. Anyhow, it may be that popular bodies or popular favourites may be great offenders at the bar of public opinion. They can only be arraigned and accused in the press.

And if under the law of libel the juries were to be then sole judges, they would be judged by those they had accused, or by those who had the most perfect sympathy with them, and, of course, would be certain to be condemned. Thus, the liberty of the press would be destroyed where it is most important to preserve it, and the worst of all tyrannies, a popular tyranny, would be established, and established by means of a jury!

Yet it is obvious that unless there is a privilege (that is, an excuse for defamation in the exercise of honest discussion, and immunity from legal liability, except in the cases of wilful wrong and malice), this must be the result, for there must be some limit to the right of free discussion and the privilege of defamation in the exercise of it; and that limit, in some form or

other, must be with the jury; and if not on the question of malice, it must be on the question of fairness. And that is a question not of judgment or evidence, as is that of malice, on which the Court can correct any perverse or wrongful verdict of the jury; but a question of mere arbitrary opinion, on which the jury would necessarily be absolute as well as arbitrary, and thus the expression of public opinion would be entirely confined to the opinion of one class of the community, not of the most enlarged or enlightened minds; and public opinion, deprived of all unwelcome correction, would be dwarfed and degraded down to the low level of the jury-box. It should seem, therefore, that even apart from positive authority in decided cases, of the precise class now in question, reasoning from the general principles on which privilege in private matters is founded, we might deduce the existence of privilege in the exercise of the right of discussion on matters of a public nature, subject, of course, to the same limitation, viz., that of the honest exercise of the right, by which is meant in law much more than the mere honest belief in the truth of the defamatory imputations conveyed.\* That is not enough, for the obvious reason that a man may publish needlessly what is defamatory, and thus, in law, maliciously, even although he believes it to be true. It may be irrelevant, it may be reckless, and, if so, it is malicious, whatever his belief. Still, honest belief is required, and included.

Let us look now to authority. A great writer on this subject, writing thirty years ago, thus summed up the law upon the subject of privileged communications:—

“The extensive principle which governs this class of cases, where the existence of express malice is the test of civil responsibility, comprehends all cases where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even those of another, call upon him to

\* *Smith v. Thomas*, 2 Bing. V.C. 372; *Bromage v. Prosser*, 4 H. 247; *Woodgate v. Wright*, 1 C. M. R. 57; *Kershaw v. Baily*, 1 Exch. 746.

perform. As, on the one hand, it would be contrary to the common convenience of society to fetter mankind in their ordinary communications, by the apprehension of vexatious litigation; so, on the other hand, it would be highly mischievous to allow men to inflict the most cruel injuries to character and reputation with impunity, under the cloak and pretence of discharging some duty to themselves and society, when they were, in fact, actuated by the most malicious intentions. The law, therefore, in such cases, most wisely makes the liability to depend on the absence or presence of express malice; and thus an ample shield of protection is afforded to all who act fairly in order that men may not be deterred by the fear of action or prosecution for making communications which are either important to themselves or beneficial to the public."—1 *Starkie on Libel*, p. 292.

Now, although the writer had only in his mind private communications, the reasoning evidently applies not only as strongly, but far more strongly, to cases of public discussion, which is, in fact, only communications to the public. The reasoning is, in those cases, *à fortiori*, assuming a fair subject of public discussion. It is admitted that in each class of cases there is a right. It is admitted that in the one class of cases there is a privilege in the exercise of the right, because the public interest requires it, that is, "because it would be contrary to the common convenience of society to fetter mankind in ordinary communications." It is admitted that the reason why there is a right of free discussion is, that the public interest requires it. There can be no doubt, as the very word "free" imports, that it requires to be protected from dread of legal liability in the honest exercise of it. Then, if the law, in its anxiety to protect the honest exercise of private rights of discussion, confers a privilege, surely the law will confer an equal immunity in the case of public discussion.

"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publications as malicious unless fairly made by a person in the discharge of some

public or private duty—whether legal or moral—or in the conduct of his own affairs in matters where his interests are concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or emergency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.”\*

Now, although this has reference especially to cases of private communications, it is based, as will be seen, on public interest and the exigencies of society. “Any reasonable occasion.” The fair meaning of the above is, that the inference of malice only arises from the unauthorized publication of defamatory matter, *i.e.*, not in the exercise of any right; and that when the law authorizes the public discussion of matter out of which defamatory matter fairly and naturally arises, so that it is so far within the lawful occasion, and so is not unauthorized, that thus the inference of malice does not arise unless raised by excess. It is true that the Court had particularly in their view cases of what may be called private or personal privilege, which, from its nature, grows rather out of personal relation to the matters in question. But from the very nature of the right of public discussion that cannot be the incident or condition of such privilege or immunity as belongs to it. And since the case just cited it has been well settled that privilege does not regard either duty or interest.

It is true that this doctrine made its way slowly, and it is many years ago since it was thus declared by the present Chief Justice of the Common Pleas, when he sat, as one of the *puisne* judges of that Court, along with the late Chief Justice Tindal, who thus laid the doctrine down:—

“I do not find that the rule of law is so narrowed and restricted

\* Parke, B., *Toogood v. Spyring*. 1 Cr. M. & W. 193.

that a person having information materially affecting the interests of another, and honestly communicating it in the full belief, and with reasonable grounds for his belief, that it is true, will not be excused, although he has no personal interest in the subject-matter. Such a restriction would operate as a great restraint upon the performance of various social duties by which society is kept up.”\*

Chief Justice Tindal and the present Chief Justice Erle thus declared the law fifteen years ago; and though the Court then were divided, and the Judges held a more narrow view of the law as to privileged communications, the larger and more liberal view was lately, in the time of Lord Campbell, deliberately adopted by the Court of Queen’s Bench. Before then, it had been laid down in the Court of Common Pleas, that privilege would attach, even to a volunteer.† And after that, even in the case of a privileged communication, it has been solemnly decided, and in the Court of Queen’s Bench and by some of the present Judges of that Court, that the privilege may attach to a volunteer, and that a party having no personal duty or interest whatever. In the case of *Harrison v. Bush*,‡ the defendant, an inhabitant of a town, had sent a memorial to the Home Secretary, impeaching the conduct of the plaintiff, a magistrate, in the discharge of his duties in matters with which the defendant had no personal interest or concern whatever, nor any interest which any other inhabitant of the town, or indeed any subject of the realm, might not equally be deemed to have. And Lord Campbell, in delivering a considered judgment, to which we observe Crompton, J., was a party, thus boldly and broadly laid down the law :

“A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without this privilege would be actionable. Duty in

\* *Coxhead v. Richard.* 2 C. B.

† *Sommerville v. Hawkins.* 10 C. B.

‡ 5 E. & B.



this canon cannot be confined to legal duties, but must include moral and social duties of imperfect obligation."

And the doctrine is applied even to cases in which there might be legal redress:—

"One mode of proceeding would have been by applying for a criminal information. But another which, though milder, may be more effectual, is to try by lawful and constituted means to have the offender removed from his office. . . . In this land of law and liberty, all who are aggrieved may seek redress, and the alleged misconduct of any who are clothed with public authority, may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it."

Elsewhere, in the same judgment, Lord Campbell says it was the duty of all who knew of the conduct imputed, to "try all reasonable means in their power" that it should be inquired into, and overrules a former opinion of the Court, founded on a narrower view of privilege, that the communication must be strictly confined to persons having authority in law to give redress.

In plain truth, it was mere stickling for the terms of an old, dead, abandoned definition to talk of either "duty" or "interest" in any sense, legal or moral, in that case. What "duty" of any kind lay upon Bush to meddle in the matter? And as to any "interest" he might be imagined to have in the removal of Mr. Harrison, it was as remote as it is possible to conceive, and not one whit greater than that which he had in the good conduct of any magistrate, or that which any person had in the character of this particular one. In simple truth, it was only a public interest he had in the matter.

The case, then, established that there may be a privilege in the publication of defamatory statements by a party who has no more than a mere public interest; that is, has no more interest in it than any one else in the country, and who is, therefore, a mere volunteer.

It appears logically to follow from the judgment of the Court in that case, that in a class of cases in which there is no

regular legal redress—as misconduct of magistrates not enough to justify an application for a criminal information—any person having a public interest, as all persons have, in the conduct of the magistracy, might discuss the matter in a public paper; so that he had a basis of fact and truths, or reported fact and public statements, as the subject-matter of discussion. For if there are public reports or statements, it is for the interest of the magistracy itself that they should be discussed; and even if they are mistaken and erroneous, they can easily be corrected; it will be a proof of malice to refuse correction of a vindication or explanation; there would be no greater degree of immunity than is allowed in cases of private imputations, or cases of private privilege; and the reasons for a similar privilege in the discussion of public matters are infinitely stronger.

Whether, or how far, a public writer would have been protected in writing in the press what the defendant in *Harrison v. Bush* wrote to the Secretary of State, would depend on whether or how far it fairly states what naturally arose out of what was already public of the magistrate's acts, or words, or conduct. Whatever was public, was matter for public comment; and whatever fairly or naturally arose out of what was public, his acts or decisions, and his public words, were so; and they might be commented upon, and any inference fairly or naturally arising therefrom. And if the comments imputed unfairness, partiality, or corruption, the question would be, not whether in the judgment of a jury they were fair; but first, whether they were such as fairly arose out of what was then public, or out of fair inferences therefrom; and then whether they were so unfair, and with such an excess of virulence as to be malicious. Assuming that they naturally and fairly arose out of the public matter, the great principle of law is the same as to public discussion, oral or written, that it must never exceed the necessity of the occasion, either as to the extent of publication, or the scope and subject of discussion. Thus a matter may be fit

and fair subject of publication or discussion at a vestry, or other particular meeting, which would be lawful subject of public discussion or publication out of that meeting; \* and so there may be a printed publication excused as to the members of a particular body, as a vestry or joint-stock company, which would not be excused if extending to any other than members of those bodies. This distinction has decided many cases, and is the true ground of the decisions in *Davison v. Duncan* (7 E. & B.), and *Popham v. Pickburn* (7 H. & N.), in which publication to the world of matters which were only excused at vestry meetings, were held not excused.

The law was stated clearly by Erle, J., in a case \* which was decided about the same time as *Harrison v. Bush*; and as that latter case illustrated the principles as to a private communication of a matter of public interest, so the other can illustrate it as applied to a case of the public circulation of a private matter that was held not to be excused, because the publication went beyond the occasion, the matter being private. In the other case the publication was held excused because it did not go beyond the occasion. But there is no indication of any difference in the application of the doctrine of privilege to matters public or private, in any other way than that distinction between them affects the degree of publicity allowed to the discussion of them. As regards the limit or extent of the comment, it is always put on the same footing, whether the matter be public or private, viz., that of malice. Thus is put by Erle, J. :

“The principle seems to be that defamatory words are *prima facie* malicious. Some occasions rebut the presumption of malice, and these are called cases of privileged communication. If the words be more defamatory than the occasion requires, that again raises the presumption of malice.”

That is, when there is an occasion which rebuts the presumption of malice, the question then is, whether there is

\* *Cook v. Wilde*, 5 E. & B.

anything going beyond the occasion which revives that presumption. Nothing will then sustain the action short of evidence of malice. It is not enough that opinions have been expressed, or inferences drawn, or even statements made of matters of fact, which are erroneous, injurious, and untrue; unless the new statements are so reckless, or the inferences so unfair, as to suggest malice in the mind of the writer. It is not a question whether he has stated facts falsely, or drawn inferences unfairly. Still less is it a question whether his observations are fair. That would be to deprive him of protection, unless the jury happened to agree with him. The question is, has he been so unfair as to show malice. Though that need not be personal.

The "occasions which rebut the *prima facie* presumption of malice" are clearly occasions on which it is lawful to discuss the subject-matter out of which some degree of defamatory observations on the particular matter naturally arises. Such an occasion is that which allows of the public discussion of such a matter as may naturally give rise to such observations. Such an occasion must rebut the presumption of malice, because it affords a lawful excuse for the discussion of the subject. That is what is called the right of fair comment on a public matter, or the public acts, words, or conduct of a public person. That is a right; and the exercise of a right the law allows is a lawful occasion for the discussion of the subject, and therefore a lawful excuse for the publication of defamatory observations which may naturally arise out of it. If this were not so, the right would be a mere delusion. It requires no "right" to publish what is not defamatory. The right of public comment must imply, within some limit, the publication of defamatory matter.

What that limit is, the law clearly defines, and in a substantial, practical, intelligible manner, and just in the same way as that in which it limits privilege in any case, viz., the honest exercise of the right. Where there is a privilege—private or public—the question is, whether it has been

honestly exercised,\* which means, whether what has been written has been written *bonâ fide*, and with an honest belief in its truth, and also has naturally arisen out of the honest treatment of the subject, with no other object than its honest treatment. Within those limits the law allows immunity to honest, though erroneous, injuries to character, rather than fetter the discussion of public subjects of public interest by the fear of legal liability for libel. The limit, it will be observed, is not merely honest belief, but it is the honest exercise of the right, and the honest purpose of its exercise, though that may often depend upon honest belief.

Neither the degree of publication nor the degree of defamation must go beyond the occasion. In matters of a public nature there may be any degree of publication, but then the limit of the degree of defamation is just the same in principle as in cases of private communication, viz., it must not go beyond the fair exigency of the occasion. This it may do in two ways; either by exceeding the scope or subject of imputation, or in the excess of the imputation itself. And, as in the last case cited, it was settled that even in the case of privilege, express malice may be shown without any extrinsic evidence, by the intrinsic evidence afforded in the libel itself, just as it is in cases of the privilege arising out of the right of free discussion. And as in the one case, the privilege cannot go beyond the occasion, that is, beyond the scope or subject of the communication, so neither can it in the other, viz., the scope or subject of free discussion. That is the limit of the right of free discussion. And the privilege which is collateral and incidental to the right, cannot possibly extend beyond it, nor excuse imputations not naturally arising out of the discussion of any fair subject of discussion. Hence we might *a priori* deduce that there must be a privilege in the discussion of public matters, for imputations may naturally arise out of some particular matters in which there is a right of public

\* *Kershaw v. Baily*, 1 Exch. 746.

discussion. And that whether the subject of discussion is such as to afford a privilege for any particular imputations, is a question of law, though whether there has been an honest exercise of the privilege is for the jury.

It might further be deduced that whether a matter is a fair subject for public discussion so as to afford a privileged occasion for defamatory imputations naturally arising out of it, would depend on the nature of the occasion for public discussion, and the scope of the subject-matter thus presented for public discussion, whether by the public acts, or words, or conduct of the party defamed, or by some other lawful publication of the subject-matter. And it might also be deduced that the right would apply not merely to the comments upon admitted acts or published words, but to suggestions of facts in the discussion of a subject, since such is the extent of privilege in private cases. This might be deduced *à priori* from reasoning on the principles of privilege, and it has been established by a series of positive authorities on this particular species of privilege, which we say is annexed to the honest exercise of this right of free discussion; whether by public writers or public speakers.

Now at the very rise of the newspaper press to its present position, as the great organ for the expression of public opinion, it was secured the full and safe exercise of the right of free discussion, by a series of wise and sound judicial decisions, at the opening of the present century, which laid it down that wherever there was a lawful occasion for its exercise, there was an excuse for the publication of defamatory matter, so far as it fairly and naturally arose. And, further, that there was lawful occasion for its exercise upon all matters of a public nature, either the publication of the press itself, or lawful reports of trials or proceedings in Courts of Law or Parliament, or public meetings, or the public words, or acts, or conduct of public men. And that in the exercise of this right, when such lawful occasion arose, the excuse for defamatory matter was only lost by such excess,

either in violence or virulence of language, which should show malice, either personal or general.

It is for the judge, in the first instance, to decide, as matter of law, upon the evidence, whether there has been any occasion for comment on, or discussion of the particular matter out of which the imputation in question might fairly and naturally arise. And, then, it is for the jury to say, whether, assuming that there was such an occasion, the imputations went no further than might fairly and naturally arise, or are so unfair and so excessive in violence or virulence as to be obvious evidence of malice. In the one case the imputations are excused, in the other they are not.

Thus, on a report of a trial for murder, even although the accused has been acquitted, the judge ruled, as matter of law, that there was a lawful occasion for discussing the question of the effect of the evidence as to the legal guilt or innocence of the party on that charge, so far as it was discussed by way of reasoning and argument, and not by way of abuse, and then it was for the jury to say whether there had been such abuse or excess, in which case there was no excuse. So as to comment on matters published by the party complaining of libel.

So as to the right of criticism or comment where the libel imputed to the plaintiff that he published books of an immoral and improper character, and evidence was admitted with a view to show (*i. e.*, to show the judge,) that the supposed libel was a fair stricture upon the common run of the plaintiff's publications, and that therefore they were fair subjects of comment, and the occasion excused any censures upon them. Now, Lord Ellenborough says :

"The main question here is *quo animo* the defendant published the article complained of, whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff? To ascertain this, it is material (*i. e.*, for me) to know the general nature of the plaintiff's publications to which the libel alludes, and the evidence, therefore, is receivable. The plaintiff is bound to show that the

defendant was actuated by malice, and the defendant discharges himself by proving the contrary."

That is, he held that as it was occasion fit for fair public comment (as of course the publication of anything always is), and as that was an occasion *prima facie* rebutting the presumption of malice, the strictures were actionable if not so unfair as to make it obvious that they were malicious. The test he applies to judge of the fairness or unfairness is the existence of malice. Then he went on, in these bold and noble words, to grant a charter of liberty to the press:

"Liberty of criticism must be allowed, or we should have neither purity of taste or of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object, not to injure the reputation of another, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

Now, as this noble passage has again and again been read from the bench, by judges as eminent as Erle and as learned as Willes, as embodying the law on the subject, it may safely be so taken.

The particular occasion was the most limited one which perhaps can arise in the way of free discussion; namely, that of criticism on a literary publication by the plaintiff. But Lord Ellenborough takes care to lay down the principle broadly, so as to comprise all cases of fit occasion for public discussion. He expressly and explicitly applies the principle to the discussion of facts and events, and to the statement of matter of fact by the public writer within the scope of the subject of discussion. Criticism, comment, discussion—these are the three degrees, so to speak, of the right of discussion. Criticism—which merely describes or denounces the tone or character of the plaintiff's publication, as appears on the face of it; as to say a book is obscene or immoral. Comment—which

\* 1 Campbell's *Nisi Prius* Reports, 351.



from these observations deduces obvious inferences; as that an immoral writer is a man of immoral mind, or that he who writes immoral books must do so for some bad purpose. Discussion—which, in regard to public matters, blends inferences, or opinion, or suggestions, as to facts, with the expression of other opinions.

There must be such an incident to the right of free discussion of public events, as there is in privileged communications on private matters, unless the private matters are regarded as of more public interest than the public; or unless the exercise of a public right, so invaluable as that of free discussion, is regarded as of less importance than mere private rights. It is plain that Lord Ellenborough used the word discussion in this sense, for he employs it in a distinct sense from mere criticism or comment, and in connexion with the truth of history, and with “misrepresentations of fact.” He evidently deems that matter of fact on subjects of a public nature, public acts, public events, and the conduct of public men in relation thereto, are as much fit occasion for public discussion as the contents of a published book; and all alike he treats as privileged occasions. That is, as in the previous passage, the presence or absence of malice is made the test. The question is not whether the jury think the comments fair, but whether they think them so unfair as to show a malicious object. This is manifest from the whole of the context. First, Lord Ellenborough says, that any publication by the plaintiff is an occasion for public comment. Next, he clearly treats that as a privileged occasion; for he expressly says it rebuts the presumption of malice, which is the strict definition of a privileged occasion. Further, he lays it down, that the writer may correct (what he deems) misrepresentations of fact, which go beyond mere comment and criticism. Moreover, he may, in commenting on the plaintiff’s publication, “censure what is hostile to morality:” that is, hostile to purity or honesty, or any other moral virtue. And as he is speaking of what may be done on the general issue, and the very objection was that the defence

ought to be pleaded as a justification, it is plain that he could not have meant merely that the writer might censure what the jury should think "hostile to morality" (as, for example, to honesty) in the plaintiff's publication, for that would amount to a justification on the score of truth. And Lord Ellenborough was not likely to have laid down so delusive and, indeed, nonsensical a proposition, by way of privilege to public writers, that they might write what they could prove to be true.

Here, then, it is obvious that the whole spirit and scope of these remarks apply peculiarly to public writers upon all public topics fit subject for public discussion; and that no limit is laid down, save that of an honest exercise of the right or privilege of free discussion, and the absence of malice, personal or general. Not a word is said as to the opinion of the jury, that the observations are fair. It is obvious that this would make the right or privilege worse than nothing; it would be a mere delusion and a snare to entrap public writers. No writer could be certain of immunity, however honest his exercise of the right; for it would depend entirely upon whether his observations might happen to commend themselves as fair to a jury, probably of opposite opinions and feelings; not to say hostile prejudices and passions. Nothing is more difficult than to estimate the fairness of opinions we dislike, and expressions we disapprove of. But malice, or no malice, is an intelligible simple issue. It is manifest then, that what he must have meant was, that the public writer was privileged to censure in the plaintiff's publication what he, the writer, deemed to be hostile to morality or honesty, within, of course, the limits always prescribed to privilege of any description, viz., that the comment must be relevant, arise out of the publication commented upon, and must not be so unreasonably and recklessly defamatory as to restore the presumption of malice.

In that case, however, it turned out that the plaintiff had not published the work ascribed to him. But that, of course, not only does not affect the law laid down, but rather confirms

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it; for his verdict being rested on that ground, implies that if he had published the work, then the imputations founded thereon, however unfounded in the opinion of the jury, would, if not so reckless as to be malicious in law, have been privileged, and that the judge would have directed a non-suit, unless there was evidence of reckless spirit.

Lest it should be supposed (as we have reason to suspect it has been), from the language used in another case, tried at the same time, before Lord Ellenborough (*Carr v. Hood*), that the privilege was restricted to ridicule and not to reprobation, we advert to that case only to remark that it was a case of ridicule; and, of course, therefore the judge chiefly dwelt on that species of libel. But so far from his remarks confirming the public writers' privilege to ridicule, his language in this, as in the previous case, plainly implies the reverse. "We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and to ridicule, if their compositions are ridiculous." It is true, he goes on to say, "Reflection on personal character is another thing." And this, we are aware, has been eagerly laid hold of, as showing that the right or privilege of fair comment can never excuse personal or moral imputation. But it is plain from what follows, that it was imputations upon private character, unconnected with the subject of public comment, to which the judge was alluding. For he adds more clearly, "Show me an attack on the moral character of the plaintiff, or any attack upon his character, unconnected with his authorship, and I shall be as ready as any judge to protect him."

Now, so far from this implying that a man's moral character may not be impeached by way of comment upon his publications, which would be absurdly in contradiction of the previous ruling of the same great judge (for to impute that a man publishes immoral words, is itself the gravest imputation upon his character), it obviously implies exactly the reverse, viz., that his moral character, as connected with his authorship, *i.e.*, as embodied in the writer's honest opinion in the publication

commented upon, is within the scope of fair comment. If it were not, then in the worst cases, the right of comment or exposure would come to nothing: and what power would a public writer have to censure what is hostile to morality or honesty in a man's publications—as every word must, of necessity, reflect heavily upon his moral character? And so the great judge goes on further to explain his meaning:

“Had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libellous, but no passage of this sort has been produced; and it does not affect the plaintiff except as the author of the book.” “The works of this gentleman may be, for aught I know, very valuable, but whatever their merits, others have a right to pass their judgment upon them and to censure them if they be censurable.”

That is, if they, the public writers, honestly deem them to be censurable; for the learned judge had just said “whatever their merits.” That is, whether or not the works are censurable, or are “hostile to morality or honesty:” the public writers have a right to pronounce them to be so; and, therefore, in the latter case, certainly to convey very heavy imputations upon moral character, provided they are not so reckless as to revive the presumption of malice.

A long series of *nisi prius* rulings from the time of Lord Ellenborough to the time of Lord Tenterden, and thence to the days of Tindal and of Erle, have confirmed the same principle of the privilege or immunity of public writers upon public matters, —and especially on published matters,—to make criminatory or defamatory remarks, not only on the matters so published, but on the character of the parties publishing them as connected therewith, provided only they wrote honestly, *i. e.*, in the honest exercise of their right, and for the honest purpose of its exercise, and not in a reckless spirit of defamation. The purpose is made the test: the object is shown by the presence or absence of reckless defamation.

Thus it was laid down by Lord Tenterden that “Whatever

is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, take an opportunity of attacking the character of its author." \*

And so the same judge laid it down thus: "A fair, reasonable, and temperate, though erroneous criticism of works of art, not written for the purpose of hurting the plaintiff in his profession, is not a libel."†

It is plain, from the whole effect of these rulings, that what was meant was not that it was for the jury, whether, assuming the comments to be on what was fair subject of comment, viz., the book, the work of art, &c., the comments were such as they thought fair and reasonable, for that would make the liability of the writer to depend upon their agreement with his comments. The words "fair and reasonable," obviously are used to convey that the comments, whatever their nature, must, in the first instance, fairly, and naturally, or reasonably arise out of that which is the lawful subject of public comment. That is to say, out of the book, the work of art, or the public matter put forth. That is, the writer might from voluptuous books, or obscene works of art, denounce them as showing an obscene mind in the author or artist; though if he used very violent language, that might be for the jury as evidence of excess and of malice. But if he made specific charge of immorality, that would be wholly beyond the occasion, and, as a matter of law, not excusable.

Now it appears to follow from the foregoing, that whatever is already published may be made matter of public discussion. The whole of what is public, and every part of it, but nothing beyond, or beyond such fair and natural inferences therefrom as must pertain to the honest exercise of the right of discussion. If acts alone, then acts and fair inferences therefrom; but if the acts are in the discharge of public duty—as the decision

\* *Macleod v. Wakeley*, 3 C. & P. 311.

† *Soane v. Knight*, M. & M. 74.

of a magistrate—then it cannot be a fair inference from the acts themselves that they are corrupt, partial, or in any way improper, as the presumption of law is that they are honest. But if the public acts consist in or contain a public exposition of grounds or reasons for acts or conduct, then those grounds and reasons will be fit subjects for comment; and any inferences fairly, naturally, and reasonably arising out of them. And these may raise considerations of malice, and may suggest suspicions of corruption. If so, their motives may be fit subject for comment. This is matter of law, and to the extent to which it is ruled that there is fit subject for comment or discussion—that discussion is excused, although defamatory, unless it is so excessive as to be malicious.

But there must be some publication, or some public material or subject-matter for discussion, to afford some ground or colour for the particular imputation made in such discussion. Thus, unless there is any public manifestation or exposition of motives, or reasons, or intentions, there is nothing to comment upon as regards either motive, or reason, or intention. And so in *Parmeter v. Coupland*,\* where the libels imputed to a magistrate partial and corrupt conduct as such, without, so far as appears, the least pretence for the imputation, the Court of course said, speaking of such a case, that “though every subject has a right to comment on the acts of public men, any imputation of wicked or corrupt motives is libellous.” Of course it is, and must be in such a case. It is an outrage upon language to call such an imputation “comment.” There is nothing to comment upon but the act itself, which, *per se*, implies that it is honest and upright. The Court never dreamt of such a monstrous proposition as that if a public man chose to put forth an exposition of his motives, a public writer might not comment thereon, and then honestly, but erroneously, draw inferences which conveyed imputation. No case relating to comment upon the plaintiff’s publications was cited in this case, clearly showing that Court and counsel thought they had

\* 6 M. & W. 105.

nothing to do with it. And as there is a right of free comment upon, or free discussion of any published matter, or any public work, so there is a right of free comment upon, and free discussion of the acts and conduct of public men, that is, in so far as they present fair subject for comment or discussion; which, be it observed, is only as to the acts or conduct so far as they are public, and does not include grounds, or reasons, or events, or motives, except so far as they also are made public, and are already matter of public exposition:—

“There is a difference between publications relating to public and private individuals. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentaries a cloak for malice and slander, but any imputation of wicked or corrupt motives is unquestionably libellous.”\*

That is, such imputations, merely on the acts themselves are not excusable; as they are not, and cannot possibly be, made by way of comment or discussion thereon, the motives not being matter of a public nature, and so not fair or fit subjects of comment at all, of any comment, fair or unfair; so that, of course, any imputation defamatory is not excused and so cannot be protected.

The rule of law as to the relative province of judge and jury in such cases, was laid down very clearly in the same case:—

“A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication the subject of inquiry is of that character, and would be likely to produce that effect, is a question upon which the jury are to show and exercise their judgment as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinions as to the nature of the publication, but

\* *Parmenter v. Copland*, 6 M. & W. 109.

was not bound to do so as a matter of law. And, indeed, the judge ought not to lay it down positively that if the publication is proved, and the words were used in their ordinary sense, the jury must find that they were libels. He ought, having defined what is a libel, to refer to the jury the consideration of the particular publication, whether falling within that definition or not."

That is, whether the publication, if not excused, is libellous, is for the jury; whether there is an occasion which may excuse it, is for the judge. Whether, again, the occasion does excuse it, or has been in the honest exercise of the right, is for the jury; or whether the defamation has gone beyond the occasion and exceeded the excuse, and so by reason of excess is malicious, is for the jury; though whether there is such evidence of excess, is for the judge.

The right of public comment must, from its very nature, be restricted to what is public; and so long as a man's motives remain private with no public indication or disclosure of them, how can they be a matter of public comment? If, indeed, a magistrate in making his decision, plainly contrary to evidence, and without any evidence at all which to rational mind could account for his decision, also makes remarks which appear to reveal an animus, and a partial feeling, or an indirect object, even although, in point of fact, his decision is perfectly honest, will any lawyer doubt that a public writer honestly commenting upon the case, coupled with those expressions, might not be privileged, in an imputation or suggestion of bad motives? Would it not, then, be an occasion of fair comment upon the motive, and would it be for the jury whether the comments were fair? Would it not rather be, are they so unfair as to be reckless?

This distinction was very forcibly brought out in the remarkable case of *Gathercole v. Miall*,\* which was very carefully considered by the Court of Exchequer, after full and able argument by most eminent counsel, and which appears perfectly to confirm the course of the present argument, and

\* 15 M. & W. 320.



the conclusion to which it tends. There the libel, published in a newspaper, conveyed serious imputations upon the plaintiff, a clergyman, of bigotry and want of charity, as indicated in his management of certain private or congregational and parochial charities, in a general and a public sense, and also as indicated in his preached but unpublished sermons. The terms of the libel are not given, but it is pretty plain that they implied a degree of bigotry and want of Christian charity, which, in a minister of religion, would tend as much to hold him up to hatred, as an imputation of want of honesty might in the case of an ordinary layman. The learned judge (Baron Parke) told the jury that every one had a right to comment upon public acts of public servants, but not on the unpublished sermons of a clergyman, and "that the public acts of public servants furnished a lawful excuse for publication, but not a sermon preached by a clergyman, unless he published it, and therefore offered it as a subject of general criticism, like any other work; and that the rules which a clergyman made for the conduct of a charity which he established, was not thereby made a subject for public comment." The Court were somewhat divided on this point, so far as the sermons were concerned; but they, one and all, in their carefully considered judgments, clearly implied that, if the occasion was one of publication by the plaintiff, and so an occasion fit for public comment, it would warrant imputations which would not be excusable in matters not public, and would be limited only by the well-known restriction established in all cases of privilege, viz., that they must be conceived in a fair spirit, and the absence of that reckless spirit of injury which the law deems malicious. Thus Baron Parke said, of a person, who by publication gives lawful occasion for public comment: "The position such a party is in gives occasion to all the public to make remarks on his conduct; and if those remarks are made in a fair spirit, they are justified under the general issue." Observe, "made in a fair spirit." The learned judge does not say they must be absolutely fair, or

fair in the judgment of the jury, still less with reference to the actual facts; but that it is enough if the remarks are written in a fair spirit; that is, fair with reference to the position of the writer, and his means of knowledge or of judgment, and especially with reference to the materials before him at the time he wrote; and to the light in which he would naturally look at them, and the point of view with which he would naturally regard them, and the state of his mind. Thus, also, Chief Baron Pollock speaks of the right of fair comment in these terms. He calls it "criticism, or the enlarged style of commentary which that word seems to introduce, according to the decided cases," and justifying, he says, "*bonâ fide* remarks, whether founded [or not,]\* in truth, in point of fact, or justice, in point of commentary, provided only they were an honest and *bonâ fide* comment," and this might be shown on the general issue.

These latter words alone would imply that the comments might be fair, although untrue in fact, or unfounded in justice, for otherwise there would be a justification, which would require to be pleaded. But the Lord Chief Baron did not leave that to inference; he carefully and explicitly lays it down in terms, that the comments may be fair, although they are untrue in point of fact, or unjust in point of commentary. And, moreover, his language plainly implies, and indeed expresses, that the comment may include fair inferences of fact. And he goes on to say of the proceedings of public persons, "they are deemed to be public property, and all *bonâ fide* and honest remarks upon such persons and their conduct" (*i.e.*, their public conduct), "may be made with perfect freedom, and without being questioned too nicely for either truth or justice." To make his meaning clearer, he goes on to say that so long as the sermon remains unpublished, "you are fettered as you would be with respect to any other matter on which you have

\* These words are plainly implied from the context, and indeed necessary to make the construction correct, and are clearly left out by some accident, clerical or typographic.

a right to comment, but on which you must comment with truth and justice."

And so as regards the rules of the charity. "It is a private matter, and is not open to what may be called licentious comment, as opposed to comment that must be based on truth." Plainly implying that in the case of a matter public in its nature, the comment might extend beyond the limits of actual or absolute truth, and might be, in comparison with what it must be in a private matter, "licentious," *i.e.*, as the context shows, not "licentious" in the worst sense, of what would be reckless and malicious, but as opposed to or compared with a right "fettered" and restricted by actual truth, which is in a private matter the limit, unless in the case of a privileged communication. The Lord Chief Baron makes this still clearer by going on to contrast the case he was considering, of a matter private and not public, with the class of cases we are considering, of comments on publications:—

"With respect to criticism on works published, they invite that criticism, they are held out for examination. . . . In the present case the question is whether a private matter may be made the subject of licentious comment. . . . I think that [*i.e.*, in this case] every purpose of public good would be answered by strictly confining it to the privilege that every man has of publishing that which is true; and that it is not at all necessary in a case of this sort [*i.e.*, a case of a private matter] to give him any power either licentiously, or with honest prejudices, to invent for himself, or to misrepresent or comment upon matters that do not exist in point of fact, however honestly."—(P. 334.)

It is clear that the Lord Chief Baron had the same view of the law as to comments upon published matters as that which Lord Ellenborough had, *viz.*, that it is an occasion of privilege to this extent, that it excuses comments even drawing inferences of fact, and conveying moral imputations; if honest in the sense of being in the earnest though erroneous pursuit of the object of the right or privilege, *viz.*, free discussion,

and not so reckless as to be malicious, even although beyond all doubt unfounded and unjust in point of facts.

And all that the other judges said was quite consistent with this view. Thus Baron Alderson said, in a passage which was most likely in the mind of the Lord Chief Justice, in *Campbell v. Spottiswoode*, but was, as we conceive, not quite apprehended (p. 338.)—

“There is a distinction between the comments upon a man’s public conduct, and upon his private conduct. You have a right to comment on the public acts of a minister. . . . but I do not know where the limit can be drawn distinctly, between where the comment is to cease, as being applied solely to a man’s public conduct, and where it is to begin as applicable to his private character . . . but you ought not to be permitted to say of a minister that he has committed felony, or anything of that description, which is in no wise connected with his public conduct.”

So far from this implying that you may not in public comments on a man’s public acts or published opinions or proposals, argue and infer therefrom imputations on his moral character, they appear plainly to imply just the opposite, viz., that you may do so, so long as you confine yourself to honest comments on what is public or published, and do not go into private matters.

It is to be observed, however, that the learned judge was speaking, not (as we are) of cases of published proposals or opinions, but merely of public acts; which, especially if acts of duty, so far from supporting imputations by way of comment or of inference, lead to just the opposite inference. So Baron Rolfe (p. 342) laid the law down substantially in the same way, and still more favourably to the public writer, and puts it still more clearly upon legal principles :

“In every action of libel, the act done is alleged to have been done maliciously ; and in the case of a libel upon an individual, it is conclusive that it was done maliciously, unless there be shown justification. But in the case of comments upon the public acts of public

servants (and there are other cases to which the same observation would apply), you may at the trial, on the plea of not guilty, show that what you have done is a justifiable act, by showing, what amounts in substance to this, that it is not done maliciously."

It is true the learned Baron went on to say, "If I make reasonable comments upon the conduct of public men in the discharge of their public duties, I am justified." But then, he was speaking of the acts of public men in the discharge of their public duties, and not of a man's published opinions or proposals, especially if for his own pecuniary benefit. And, as already observed, an act, at all events in the discharge of a public duty, can never, *per se*, be, properly speaking, the subject of comment, in the larger sense of inference which is allowed as regards published opinions or proposals. But the learned judge went on to explain what he meant by "reasonable." "There is no pretence for saying that any one of the observations made in this libel could possibly have been treated as fair observations;" and lest there should be any misunderstanding, Baron Parke added some further observations, in the course of which he said—

"The question is whether there was any occasion which would justify the remarks that had been made, or any remarks upon the conduct of the plaintiff; because if the statements contained in this paper are true, the rule is, that the defendant must plead the truth of them; but if the plaintiff has given lawful occasion by his conduct for the remarks, that is evidence under the general issue. And I am of opinion that an individual who gives to the public any literary work, does give occasion for remarks."

Thus, then, the fair result of the full and well considered judgments in this remarkable case is quite in accordance with the great rulings of Lord Ellenborough, viz., that a man by publishing any opinions or proposals of his own gives lawful occasion for public comment or remark, and that these comments or remarks are privileged if written honestly and in a fair spirit,

and not so unreasonably or recklessly as to be malicious, even although utterly unfounded, unjust, and injurious.

It might have been supposed that, if there were one thing more than another which was proper subject of public discussion, it would be a sermon, which may, it is well known, be a polemical or even political discourse in the last degree exciting to the public mind. Every one will recollect Burke's trenchant comments on the remarkable sermon by Dr. Price, at the Old Jewry, in favour of the French Revolution. And in nearly our own times, there has been a prosecution for sedition, on account of a sermon.\* And so of any other public act of a minister of the Established Church, in that capacity, even although relating to a parochial charity, because, though, no doubt what is parochial is not strictly public, it certainly is not private, and the acts of a public man in his public capacity, with reference thereto, could not fail to make of public importance, whether by way of example or otherwise, anything wrong in principle, whether legal or moral. If, for instance, a clergyman in administering a parochial charity, did so on principles of sectarian and narrow-minded intolerance, that surely would be of public cognizance, as a matter of public scandal, of crying injustice, and of evil public example. It is impossible not to see that the views expressed by the Court on that part of the subject are somewhat confused and unsatisfactory. But of this there is no doubt, that assuming an occasion and a subject for public discussion, the opinion of the Court was, that there would be, in the exercise of that right, an immunity from legal liability in the discussion of that subject.

Although, however, the case of some publication by the plaintiff himself is perhaps apparently the clearest, it is obviously the most limited, occasion for public discussion, as, unless there be superadded on the plaintiff, the character and position of a public man, and public acts and conduct on his part, *per se*, the fit subject of public discussion, the right will

\* Adolphus's "History of England," Reign of Geo. III.

be limited to such subjects as are presented by the plaintiff's own publication. The public acts or conduct of public men are, however, we have seen, in a certain sense, public property, and, *per se*, fit subjects of public discussion. The limits of the right of free discussion in such case, however, if necessarily larger, are for the same reason less easy of definition or description. And here, indeed, arises the greatest difficulty of the question, as it is also its most important aspect.

The solution of the difficulty in each case, however, must depend on the steady application of the same principle as in the other class of cases, and a careful attention, above all, to the nature of the occasion which arises for discussion, and the scope of the subject-matter presented for discussion. It is obvious that this, in the class of cases we are now considering, depends greatly on the nature of the public acts or conduct discussed. Acts vary considerably in their nature and in the extent of material they present for consideration and discussion. These, indeed, depend a good deal on the surrounding facts and circumstances. Some acts have more of these than others, and of a very different nature. In the decision of a magistrate there are the evidence, the relative position of himself to the parties, the observations he has made, and the like—all circumstances whence the nature and motive of this act may or may not become fit subject of discussion. A judicial decision is, perhaps, the easiest instance of the class.

The most difficult class of cases is that in which the subject of discussion is the public conduct of a public man, which conduct itself is more or less subject of doubt and dispute, as a matter of fact. That is, there is, or may be, a two-fold subject of discussion as to the acts or conduct of public men: first, what it has been as a matter of fact; next, what it is to be deemed or described as matter of opinion. And, perhaps, in most instances, there is a middle sort of cases, in which more or less inferences of fact are drawn from admitted facts as well

as inferences of opinion, on facts admitted or inferred. Now, to make the right of discussion anything, it must embrace all three, so far as there is a basis of undoubted truth and fact, out of which all these may naturally and not unfairly arise. On this class of cases there is a singular absence of positive authority.

There had hardly been any case of defamation as the excuse of the right of free discussion on public acts of a public man, or materials affording scope and subject-matter for defamatory imputations. That is, there had been no such case reported; fortunately, we are in a position to supply a notice of a most remarkable and valuable case exactly of that character, which, for no reason that we can divine, except that eccentricity which constantly leads reporters to omit the most important cases, does not appear to have been reported in law reports. This case is, perhaps, the most valuable of any that has ever occurred upon the subject, on account of its really involving the necessary question of privilege in such cases, and on account of the high character of the judges composing the Court at that time, and the bold, decided way in which they met the case, and acknowledged, or rather asserted the privilege of the press, in the exercise of the right of free discussion.

It was an application for a criminal information; but there were all the requisites of such an application, and the decision went entirely on the ground of privilege or excuse from all legal liability.

In that case there had been a publication of some Parliamentary papers upon the war in Scinde, and there was an article thereupon in the *Quarterly Review*, for September, 1852. That article was one in which very serious imputations were made upon the character of Sir Charles Napier. The libel was chiefly in allusion to his treatment of the Ameers of Scinde, speaking of the "harshness of the demand made by him," and which led to their conquest, and charging him with the plunder of the palaces at Hyderabad, "even to the women's wardrobes," and contained this passage:—



“No one believes that the Ameers, by their conduct, received more than friendly advice or warning. We doubt if the Governor-General originally intended more; yet what have they received, through Sir Charles Napier's ungovernable determination, at whatever cost, of confounding the innocent with the guilty, to achieve a conquest!”

Here was a clear charge against a public officer, not only of an act censurable in its own character, but also proceeding from a most vicious motive, and for a most improper purpose, “an ungovernable determination, at whatever cost, of confounding the innocent with the guilty, in order to achieve a conquest,” in which shameful plunder, after capitulation—a disgraceful act, contrary to the Articles of War, and a gross piece of military misconduct—was committed. The applicant denied the truth of these charges *in toto*, and it appeared that there were public sources of information, from which the writer could have discovered their falsehood. There had been a publication before Parliament of official papers relating to the annexation of Scinde, and these told the whole story. The *Quarterly*, in an article on the subject, by way of a review of these papers, had severely attacked and censured the conduct of Sir Charles. Yet the Court refused the application, and Lord Campbell said:—

“If you could persuade us that the article was written with the intention of calumniating Sir Charles, that would require an answer. But there is no evidence of that. The article seems to be an historical essay on a disputed passage in history, as to whether the Ameers were treated with harshness or generosity, and I should be encroaching on the liberty of the press to grant an information in such a case. The Court sits, upon constitutional principles, to repress the licentiousness of the press, but nothing more. Whatever may take place elsewhere, we hope that this country will still continue to boast of a free press, and that questions of history, modern or ancient, may be discussed freely, without dread of a criminal information.”

And of course equally without dread of an action. The same  
VOL. XV.—NO. XXX.

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principle would equally apply. We do not suppose that Lord Campbell meant by "the intention of calumniating Sir Charles," a particular intention of that kind, or any personal malice. He, no doubt, meant a general intention of writing maliciously; the general malice implied in reckless writing—a spirit of defamation, instead of the spirit of discussion.

Lord Campbell, however, as Lord Ellenborough had done fifty years before, in cases he had himself reported, makes it a question, in that sense, of the object or intention of the writer, which in regard to imputations, obviously defamatory and admittedly false, would be, of course utterly irrelevant, unless it were a question of privilege. Lord Campbell holds, in the first place, that the occasion was one for free discussion on the particular matters of the imputation, even to the extent of suggestion of a preconceived design to effect a wicked and unjustifiable conquest, by a conscious violation of moral right. And these matters, no doubt, were raised by the official papers which had been published; although, as they were published by Parliament, who admired and upheld Sir Charles, it is needless to say that they contained nothing to warrant the imputations themselves. Lord Campbell repeatedly declared, that he took it for granted they were utterly false. Beyond all doubt, they were really defamatory—defamatory in a moral, not merely in a political or military sense. Yet they were held to be excused, because there was a right of free discussion of the particular matters to which the imputations related; and they were, it is evident, held not to have been excessive or malicious, but to have been published in the honest exercise of the right of free discussion. And thus, though they went far beyond mere comment or criticism (indeed the contents of the papers were only partly Sir Charles's despatches or letters), and were in the way of defamatory deductions or inferences of the writer's own, founded on materials lawfully published, by way of argument thereon, not of mere invective or abuse; first, there was the right of public discussion; and then, an excuse, immunity, or privilege, for defamatory imputations, in the honest exercise of that right.

That case is of the more interest on account of the fact, that two of the judges who concurred in it, Mr. Justice Wightman and Mr. Justice Crompton, are still members of that Court, and that Mr. Justice Erle was the judge who, a few years afterwards, tried the next great case on the subject, *Turnbull v. Bird*. We shall see how firmly and how fearlessly he applied in that case the principles he had united in attesting in the remarkable case of Sir Charles Napier. And before passing from that case, we desire in particular to call attention to this, that after having affirmed the right of public discussion of the particular matter out of which the imputation fairly arose, Lord Campbell does not treat it as a question whether, in the opinion of the Court, the imputations were fair. On the contrary, he clearly implies, in various of his observations, that the Court thought they were not so. But to have decided against the writer on that ground, would have been to make his own opinion the measure of the right of public discussion!—a monstrous conclusion, from which his strong good sense and sound knowledge of law preserved him. Having affirmed the right of free discussion as to the particular matters, and held that the imputations fairly arose out of those matters, he treats it as a question of malice or no malice; and in that view, as a question of the animus, the object, the intention of the writer. That is, he affirms privilege, and then considers its honest exercise, without malice or excess.

In entire accordance with these conclusions, Mr. Justice Willes ruled, in a case tried some years ago on the Home Circuit, the case of the *Athenæum*,\* the editor, referring to some announcements by the plaintiff and others, of sales of pretended antiquities, denounced them as a “gross attempt at imposition;” and the learned judge directed a verdict for the defendant, or a nonsuit, without leaving it to the jury at all; there being no evidence of malice; and “the publication being pro-

\* *Holmes v. Eastwood*, 1 Fost. & Finlason.

tected by the privilege of a fair discussion on "matters of public interest." The plaintiff was not named in that case, but that would not matter, as there was evidence that he was included, and intended, and understood to be alluded to, *inter alios*; and though the learned judge observed upon that, it was rather, it should seem, in aid of the other and better ground of decision, as showing that there was an entire absence of personal malice. However that may be, the learned judge laid that principle down boldly and broadly. He laid it down that there is a privilege whenever there is a right of public discussion; and that there is this right of public discussion of matters of fact (not "comment" merely) on any question of public interest. And that, when there is such an occasion, it is a question of malice or no malice. Nothing is clearer than that, when there is a privilege, malice must be proved, and therefore its absence must be presumed, until such proof is given; though it is equally clear that the proof may be supplied by the nature of the publication itself, its excess of violence and virulence, and such a degree of unfairness as to amount to evidence of malice: a reckless, unnatural, or spiteful tone and temper of writing, a savage spirit of defamation, easily distinguishable from that of fair, though caustic and severe, censure. It is not a question in such a case (according to the above authorities) whether the observations are fair in the opinion of the jury; that would be fatal to freedom of discussion, as it would make juries absolute masters of public opinion. The question is, whether the observations are so grossly unfair as to be malicious. The precise point on which the immunity may turn will vary with the circumstances of each case; for in one case the honest exercise of the right will turn on one point, and in another case on a different one. If, for example, it is admitted that the occasion is one for public comment, but the particular observations complained of are irrelevant, honest belief is not material. So if there is an

excess of virulence or violence. So if there be actual personal malice. But if there is no question that the observations were honestly meant for the purpose of discussing the subject, and they are relevant, and do arise out of the matter, naturally enough, though by way of erroneous inference or suggestion; there the question will turn upon the honest belief in the truth, for upon that it will depend whether the writer wrote honestly and in the honest exercise of his right; and if not, then the presumption of malice arises, as it will arise when there has been excess of violence or virulence, even with honest belief. Assuming a lawful occasion to discuss a subject out of which defamatory observations may naturally arise, then they are excused, within the point of publication, and the scope of such discussion, so far as they do thus naturally arise; and provided they are not in excess of the particular occasion, supposing it thus to have arisen. That is supposing there is a lawful occasion and excuse for making defamatory observations, by reason of there being an occasion of public discussion of a subject, out of which they may naturally arise; then the question, how far they have arisen, and whether there has been an excess, is a question for the jury, for it is a question of malice. And assuming the other requisites of the protection, that is, an occasion and excuse for some defamatory observations on the subject, the question will be, either as to oral or written discussion, "whether the statement was *bonâ fide* and honestly made, and the defendant thought at the time it was true."\* It was so held of a discussion at a vestry meeting, and the same law of course would hold, as to a fit subject for discussion at a public meeting, or a fit subject for discussion in a public newspaper. So in the remarkable case of *Turnbull v. Bird*. In that case, in which the action was against the writer; the libel imputed to the plaintiff by way of criticism, or comment upon

\* *Kershaw v. Bailey*, 1 Exch. Rep., 746.

his writings, that his integrity was so doubtful that there "was need of three gentlemen to watch him; that the papers entrusted to him, were not safe in his keeping; and that persons like him, and of his opinions, would be likely to burn any such papers." There was thus the direct suggestion or assertion, as an inference of fact from the nature of the plaintiff's public opinions, that he was utterly untrustworthy. It is a complete mistake to suppose, as some do, that it was a mere attack on Catholics in general. It was just the reverse; it was purely personal, and pointed to the plaintiff himself, as founded upon his writings, his published opinions, his peculiar expressions, his particular antecedents. And it would be impossible, as the judge (Lord Chief Justice Erle) said, to conceive a more direct or more odious imputation upon the personal character of the plaintiff. It professed to be founded, however, partly on the plaintiff's published and uncompromising adherence to the morality of the Jesuits, and their "Constitutions" were relied upon as loose on moral principle. Moreover, it was accompanied by a distinct and independent assertion of a matter of fact, by way of inference from other facts, that the plaintiff was so distrusted, that he was actually watched. And, on the other side it was said, that not only was the construction put upon the Constitutions of the Jesuits false, but grossly false; and that not only was the representation of matters of fact untrue in fact, but that it was wilfully false; and that the writer knew enough of the plaintiff's antecedents to be aware that what he imputed must be false; so that there was far more than mere comment or criticism; there were even inferences of fact as well as of opinion, there were statements of matters of inference, both of fact and opinion, in the highest degree injurious to the plaintiff, morally and personally, as well as in his office of honour and trust. Yet the Lord Chief Justice did not hesitate to lay it down broadly, that as the office and employment was

public, and the matters stated, as well as the subject matter of comment related to it, even although they were also connected with personal character, the occasion was privileged, and the writer protected from legal liability, provided he wrote honestly, and in the honest exercise of his right.

This of course necessarily implies that in the view of the Lord Chief Justice there was a privilege to a public writer, that is, a protection or immunity from legal liability for defamatory matter, in the honest exercise of the right of free discussion on public matters; for otherwise, of course, the facts of *bona fides* or of malice would have been irrelevant, and could not possibly have arisen. And it also implied that Lord Chief Justice Erle considered, and held, as matter of law, that in this instance there was a fair occasion for discussing the particular matters out of which the imputations arose, viz., the nature of Jesuit morality, the degree of the plaintiff's adhesion to it, and the probable effect of it in his discharge of his public duties. On the other hand, it is clear that Lord Chief Justice Erle deemed that there was evidence of actual malice in the legal sense (as obviously there was in several ways) or otherwise he would have had to direct a verdict for the defendant. But he left that evidence to the jury, with a direction which in substance amounted to this, that there is a privilege or protection to a public writer in the exercise of his right of free discussion, on matters fair subjects of discussion for defamation, naturally or necessarily arising out of the honest exercise of that right.

Thus the Lord Chief Justice Erle directed the jury in these terms:—

“There is no doubt that the matter complained of is a libel, and would entitle the plaintiff to your verdict, unless the defendant can establish a defence. Now the law is, that defamatory matter is presumed to be malicious unless it is published in the performance of any duty, legal or moral, or in the exercise of any right. The defence on the present occasion comes under the latter head, as a

matter necessary to the protection of the public interests, or in the exercise of a public right; and the law is that a man may publish defamatory matter of another holding any public employment, or if it is a matter of which the public have any interest, within the limits I shall lay down in accordance with decided cases. 'Every person,' it has been laid down, 'has a right to comment on the acts of a public man, which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander.' And I am of opinion that the occasion here would justify the comments, provided they can be brought within the limits laid down by the law in this class of cases. Now, the rule in these cases is that the comments are justified provided the defendant honestly believed them to be true. Within those limits the law allows the publication. The word malice in law means any corrupt motive, any wrong motive. And if you are of opinion that the defendant in the comments he made was guilty of any misrepresentation of fact, or if he made his comments with any known misstatement of fact which he must or might have known to have existed if he had exercised ordinary care, then he loses his privilege, and the occasion does not justify the publication. You are to consider the antecedents of the plaintiff as they might have been known to the defendant, and to judge whether, under the circumstances, the publication was *bonâ fide*, and whether the defendant could honestly have believed that the plaintiff was capable of the acts suggested as likely to be committed by him. It is for you to judge whether the misstatement was reckless, or made with a want of ordinary care and caution, and whether the comments made on the plaintiff's former writings were fair and just (that is, as he went on to explain), whether the defendant, fairly and honestly, in the exercise of the privilege the law allows, published what is complained of." \*

That is, whether they were fair to the mind of the writer, supposing him to use ordinary care and not to be reckless and careless, but to be honestly pursuing his privilege. It was not put to the jury simply whether the defendant honestly believed; but whether he honestly wrote: a very different thing; including, indeed, the other, but also including some-

\* 2 Fost. & Finlason, 524, 525.



thing more—the absence of that reckless spirit which is legal malice, which would partly depend upon belief.

It is true that in one particular passage the Lord Chief Justice spoke of honest belief as the test, and the learned reporter seemed at the time to have distrusted this passage (which certainly by itself might have a tendency to mislead), and hence added a note referring to the general scope of the summing up; which evidently implies and assumes that the occasion was privileged; that is, that there was a lawful occasion to discuss the particular matter out of which the imputation naturally arose (viz., whether the plaintiff's predilections and principles made it safe for him to have the care of the papers), and then the question would be whether he wrote in the honest exercise of the right of free discussion of that matter; and, as the great test of that, whether he honestly believed in the conclusion he drew, and the opinion he expressed. The reporter, therefore, was wrong when he suggested in a note that this opinion or belief must be reasonable; that would be restricting the right of discussion within the limits of the opinion of the jury on the subject of discussion. The question was whether the writer was honestly exercising his right of discussion on the particular matter; and if so, and if he wrote honestly, then it did not matter that his opinions might appear not reasonable unless so unreasonable or irrational as to be reckless; which is, perhaps, what the reporter meant, for the law does not deem that to be honest which is so unreasonable as to be irrational or reckless.

Let us see how these principles have been illustrated in some of the more recent cases.

In *Paris v. Levy*, the plaintiff had published a handbill in the way of his trade, and the defendant, the editor of a newspaper, in commenting upon it, said that it incited servants to rob their masters. There was no plea of justification. It must be taken, therefore, as admitted, that the handbill was not dishonest, and had not the intention or the effect

ascribed to it. But upon the general issue Lord Chief Justice Erle thus directed the jury :

“The plaintiff is not entitled to recover your verdict unless he establishes that the defendant was actuated by malice. The law does not require that the plaintiff should show personal malice or illwill, but that the defamatory observations were published without any of those causes which the law considers will justify them. Such causes excuse the publication, because they show that the party was not actuated by any corrupt or malicious motive in saying that which tends to defame the character of another.”

Now, observe, the Lord Chief Justice treats the occasion as privileged, and as rebutting the inference of malice.

“There are many occasions well known to the law which justify the use of defamatory words on the ground that malice is negated. In criticism on matters which have been published by the complaining party, Lord Ellenborough laid down that a publication is not a libel which has for its object not to injure the reputation of another, but to censure what is hostile to morality. If you give, therefore, your verdict for the defendant, it must be on the principle so laid down.”

Not on the ground that the plaintiff thought the handbill had that tendency, for that would be a justification which should be pleaded; but on the ground that the defendant might without malice, that is, not so unfairly as to amount to recklessness, infer that it had that tendency. This is plainly the fair effect of the whole of what the Lord Chief Justice said in his ruling on that case, and any isolated expressions he dropped as to “well-founded,” must be construed with reference to, and consistently with, the principle he laid down.

The Lord Chief Justice went on :—

“In the article in which the tendency to incite servants to dishonesty is imputed, I can see no word against the plaintiff as a private individual, or going beyond the handbill; but if Paris puts forward a handbill and draws public attention to it, which, in the

opinion of the editor, is most dangerous as an incitement to dishonesty, it may be that he will be able to excuse before a jury the remarks he has made if in their judgment they are well-founded and applicable to it."

That is, not true, nor strictly well-founded (for if so, that would be a ground of justification, and not available upon the general issue), but fairly "applicable" to it, in the sense of being relevant thereto and fairly arising out of it; and naturally, (whether truly and justly, or not) suggesting themselves to the writer in the honest exercise of his right or privilege as a public writer, not writing maliciously, but really with an honest animus, and with some fair colour for his censuring and his strictures. Taking the whole direction together, it is clear that the Lord Chief Justice did not mean that the right was restricted to such observations as the jury might think fair.

That case was confirmed in *banco*; and Mr. Justice Byles said — making the test the public or private nature of the matter commented on :—

"The remarks were privileged, if the jury thought that they were a fair and reasonable criticism, not reflecting on the private character of the plaintiff. The question is, do they go beyond the limits sanctioned by law, and cast a reflection on the private character of the plaintiff."

That is, not his personal character, (for any imputation on character, whether in public or private matters, must be personal), but private character, that is, character in private matters, not connected with or arising out of the public matter commented upon. Then the learned judge, delivering the unanimous judgment of the Court, quotes the principal passage from the direction of Chief Justice Erle, as above given from the Report quoted, and declares it to be correct. And Mr. Justice Keating distinctly declares the publication "privileged, as it did not attack private character." \*

\* 30 L. J. C. P., 11, 12, 13.

The doctrine was again laid down by that eminent Judge, Mr. Justice Hill, in *Wilson v. Reed*,\* where he thus founded it upon the real legal principle.

"Any publication which exposes an individual to hatred, contempt, or ridicule, being published without lawful excuse, is a libel. . . . But it is lawful to publish in the columns of a public journal matters of public interest, provided it be done *bonâ fide*, without actual malice, or the unnecessary making of personal imputations upon any individual."

And in that case it was plainly unnecessary and voluntary, for the plaintiff had published nothing, nor had he done any thing publicly; and the imputation was one of corrupt conduct in the being bribed to give a certain vote at an election. The vote was public, and so the matter was of public interest. The supposed corruption was private, and a mere bare assertion and voluntary suggestion of the defendant, not founded on any public conduct or published words of the plaintiff.

But the learned judge does not say that personal imputation can never be exercised as a part of "fair comment." He only says that it cannot be excused where it is irrelevant or purely invented, and not necessarily or naturally arising out of anything publicly said or done by the plaintiff. And, accordingly, we observe that the learned reporter appends this note:

"In the above case it will be seen that the direction proceeded upon the same principle *Paris v. Levy*. There the alleged libel consisted of comments, the jury thought just, on a publication by the plaintiff. Here, on the other hand, the defendants had, without necessity, published statements as to the private conduct of the plaintiff."

But the ruling of Mr. Justice Hill is plainly to the effect that the occasion of the discussion of a matter of a public nature does excuse such defamatory matter as naturally arises out of

\* 1 Fost. & Finlason, 149.

such discussion. The very distinction between public and private matter implies this. So in a case\* where the publisher of a newspaper charged the plaintiff with having shown, in prior publications "a motive which had overcome truth and honesty," and there was no justification, and only the general issue, Chief Justice Erle thus laid down the law with admirable accuracy and fidelity, and in the clear light of principle :

"This is an action which is not maintainable without malice, which means in law any wrong motive. Nothing is more important than to draw the line duly between fair discussion for the advancement of truth, and publications for the aspersion of personal character. The case of a servant is only an instance illustrating the legal principle upon which defamatory words may be justified by the occasion. This is a kind of case which is more rare, but is reducible to the same general principle, when the plaintiff and the defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public ; it is in such a case important to see if malice is made out against the party sued ; or if he has published only what he believed to be required for the interests of truth. If you are of opinion, upon the whole, that the defendant wrote what he did for the purpose of maintaining the truth sincerely, having that object in view, without any corrupt motive, and that the language he used, even although exaggerated, was prompted by a desire to maintain the truth, then you are at liberty to find the defendant not guilty."

The Chief Justice, it will be seen, treats the occasion as privileged, and the test he applies as to whether the publication of the particular expression was privileged, or whether they were not so reckless as to show malice, is as follows :

"Are the expressions used by the defendant in commenting upon the plaintiff's publication so intemperate as to satisfy you that he was actuated by an improper motive? Or are they such as under

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason.

the circumstances were not too strong? Was there not ground for saying what he did? Was not that a natural, though a rash, conclusion? Was it not a natural desire to correct a misrepresentation of fact, or was it the malicious and improper motive of injuring the plaintiff? \* In the latter case, find for the plaintiff; in the other case, for the defendant."

That is, the matter being public in its nature, the test of liability is made malice, and the test of malice excess in violence or virulence.

It has been seen that there is a close connexion between the rights of public discussion exercised orally and in the press. They are, indeed, only different forms or modes of exercise of the same right. The judges have more than once observed that there is no peculiar privilege to newspaper writers, and the right of free discussion of public matters is common to all men. No doubt this is so, and of course it follows that the same limits are to be assigned to the right of oral and of written discussion on public matters. Now, the very judge who tried *Campbell v. Spottiswoode* tried a case of oral exercise of the right of free discussion, in which he clearly and boldly laid down the law as we have here asserted it to be, viz., that the only limit to the exercise of the right is such excess as would be evidence of malice. In that case,† the defendant at a public meeting charged the plaintiff with having misappropriated the funds of the parish and applied them to his private use. It was contended that the occasion was protected, and that the words were privileged.‡ The Lord Chief Justice ruled thus:—

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason, Rep. 610.

† *George v. Goddard*, 2 Fost. and Finlason, 689.

‡ Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for re-election that he had misappropriated parish moneys while holding the office before:—*Held*, that the occasion was privileged, but that whether the words were so, would depend, not merely on whether they were wilfully false, but whether on the face of them they were so far beyond the occasion that the jury might fairly infer the occasion was merely *made use* of for the purpose of personal malice.—*George v. Goddard*, 2 Fost. and Finlason.

"COCKBURN, C. J.—I shall tell the jury that the occasion was privileged; but that the statement, though made on such occasion, will be unprivileged, if the making it was a malicious abuse of the occasion. They have a right to ascertain the real meaning and intention of the plaintiff in the words complained of, notwithstanding other words of courtesy and kindness.

"If the defendant simply meant to censure the conduct of the plaintiff as overseer, in relation to the law proceedings, and to the money borrowed for them, and repaid out of the rates, his statement was privileged by the occasion. If, on the other hand, he availed himself of the opportunity afforded him, by the meeting of the rate-payers, to bring forward a charge against the plaintiff, not merely of exceeding his duty, but of corruptly violating it, by applying the parish money to his own private purposes, the statement was not privileged, nor was it protected by the occasion. If the language of the defendant was entirely disproportioned to the circumstances under which he would be privileged by the occasion, the jury would be justified, I think, in inferring malicious motives, for they only would be the motives which would prompt such language; but, if it be plain to the jury that the defendant's language described only the excess of duty, without imputing private corruption, then I shall tell them the occasion and statement were privileged."

It follows from the above extract, if a public writer had, upon a publication by the plaintiff of a letter setting forth the matter, commented upon it to the effect of the above libel, it would have been equally protected, and within precisely the same limits.

The only distinction would be, that as the privilege of oral discussion would be restricted to a public meeting at which the matter might naturally, that is, fairly arise, so the privilege of printed discussion would in like manner be limited to the occasion of some publication in which it would fairly and naturally arise, that is, either an official or legal publication, or a publication by the plaintiff himself of some matter out of which the imputation might fairly or naturally arise. It would not be competent to a public speaker at a meeting

which had nothing to do with the matter to enter into a discussion of it. Neither would it be competent to a public writer, without waiting for any publication by the plaintiff, or some lawful authority, of some matter which made it relevant, of his own mere motion, to raise the question and publish the imputation. In either case the occasion must in that sense fairly, that is, naturally arise; but when it does so it is protected provided there is no excess.

This is the true and only indication of cases like *Davidson v. Duncan*, and *Popham v. Pickburn*, in which it has been held that publication of a report of defamatory observations at a vestry meeting, or of defamatory comments on a report presented at such meeting were not protected. The publication in each case was to all the world; and the words uttered at the vestry in one case, and the report presented to the vestry in the other, were publications limited to the vestry in each case, and such as would not fairly warrant a publication to the world. That was the real ground of the decision in each case. It was not held (as was supposed in the first case) that a report of defamatory observations at a public meeting could not be protected, for what it would be competent to a public speaker to say to all the world (could they be present at a public meeting), it would be surely competent to a public writer to publish to all the world in a newspaper. But neither the one right nor the other would extend to matter limited to a particular body or vestry.

It is to be observed, however, that even a matter arising before a particular body may have a public interest, such as will make the whole of it fair subject of public comment. This was one great point determined in the case of *Seymour v. Butterworth*, as to an inquiry before the Benchers of an Inn. Another point, and quite as important, was there determined, namely, that even the private character and conduct of a public man may be fit subject of public discussion, even as to matters not involving moral misconduct, as, for instance, debt. In that case, the able counsel for the plaintiff, Mr. Lush,



than whom no one could be more safely relied on for a fair and correct statement of the law, seems only to have relied on the allusions to private conduct, and on evidence of malice. He said :

“I shall ask whether it is a fair and legitimate comment upon a man’s public career, or whether it is not a malignant and studied attack upon his professional life, dictated by private ends. I am here not to say one word against the liberty of the press ; on the contrary, I hold that, as Englishmen, we have no greater social right than the right of free discussion ; still it is necessary for its very maintenance that it should be guarded and preserved within its proper province. I admit that in the newspapers the conduct of every public man, from the highest in the realm down to the lowest, may be freely discussed. The conduct of any member of Parliament in his public capacity may be discussed ; nay, the very investigation in which we are now engaged may be fully criticised. But men must not go beyond that : if they invade the sanctity of private life, and groundlessly impute corruption in the relations of that private life, then the liberty of the press is abused, and the interference of the law may be justly claimed. If this publication had contented itself with a mere criticism upon Mr. Seymour’s Parliamentary conduct, if *bonâ fide*, however severe it may have been, it would not be liable to an action ; and the same is true of similar criticisms upon his professional career. But rumours, mere rumours of charges which had taken no fixed shape, such as these, no man had any right to embody in a published attack against any man. Nevertheless, this writer has done so, and he has chosen to embody every rumour which he found afloat in his indictment against Mr. Seymour. I ask you to consider, is it not manifest that the man who penned this article was influenced from first to last by personal motives to endeavour to crush Mr. Seymour, socially, politically, and professionally.” \*

That is to say, (as we collect,) the learned counsel did not consider that his client could complain of the strictures, however severe, on his conduct in Parliament, but only of the embodiment of rumours as to the charges of private mis-

\* Foster & Finlason.

conduct, the Benchers' report not having been generally published.

He appears to have admitted that the act would have been fair subject of comment ; and as to that, relied on evidence of motive. This was putting the question, as we conceive, quite correctly in point of law, as to the form in which it arose. The Lord Chief Justice, however, ruled, and as we conceive rightly held, that the private conduct of the plaintiff, in so far as it went to show whether he was a fit and proper man for judicial functions, was fair subject of comment ; and that, for that reason, the inquiry before the Benchers, though a purely domestic forum, was also fit subject of public discussion. He said :

“No doubt the stinging part of the article was that which related to the charges which had been made the subject of inquiry by the Benchers, and he differed from the learned counsel for the plaintiff, when it was contended that under no circumstances could private conduct form a proper subject of observation for a public writer. Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. Mr. Seymour was a barrister, and, as such, was subject to the domestic forum of the Benchers. It was beyond dispute that if the conduct of a member of an Inn of Court was such as to be unworthy of a gentleman, he was within the jurisdiction of the Benchers of his Inn. In the same way as officers of the army were subject to investigation when charges were made against them of conduct unbecoming officers and gentlemen, barristers were subject to the jurisdiction of the Benchers if their conduct was unbecoming the profession and unbecoming gentlemen. The Benchers exercised their jurisdiction partly for the protection of the profession and partly for the protection of the public—for the protection of the profession, that it might not be disgraced by having enrolled among its members those who dishonoured and discredited it ; and for the protection of the public, that their confidence in the rank of the barrister, being a sufficient test of the trustworthiness and honour of each individual member of the Bar, might not be misled and abused.”

And, upon this, the most important part of the case, the

Lord Chief Justice appears also to have held that the comments made were within the privilege ; though it is not quite so clear whether he meant to leave it to the jury to say if they were fair ; or to tell them that in his opinion there was no evidence of excess or of malice—which latter we conceive would be the proper way of putting it.

“ The writer added no facts of his own, and was not responsible for the facts. A tribunal of competent authority, the writer said, had made public a sentence reflecting upon a public man, and that man, upon whom censure was passed, had taken no step, either by publishing the evidence or by appeal to a superior jurisdiction, effectually to vindicate himself from the sentence. Surely it was a fit subject for public animadversion, whether the person censured was fit to occupy the position of barrister, judge, and member of Parliament. There was no attempt to add any facts, and the writer, proceeding to make comments, said to the effect that, until Mr. Seymour took the course which was open to him, of bringing before the public the whole of the evidence which had been taken, and of which he was in possession, so long there would be nothing but his assertion to meet the sentence, and so long the writer would take the liberty to say the sentence was well founded, and the facts upon which it proceeded incontestable.”

We may observe, however (as this appears to imply that a public writer can draw no inferences), that the writer drew an inference, and a rather strong one ! but which we conceive he was quite warranted in drawing, as to the course which the Benchers in his opinion ought to have taken. And we protest against the implication that a public writer can never add facts, either by way of inference from that which is fit subject of comment, or from those materials along with other public facts. It is confining the right of discussion within very narrow limits to restrict it to mere criticism or comment on what may appear within the four corners of a particular document or on the face of particular papers. There is the question of the time at which it is put forth ; the relation which it has to past, or present, or impending circumstances,

or to past declarations or notorious obligations of the party whose acts are the subject of discussion. All this, however, must depend, of course, upon the particular circumstances of each case. The great point for which we contend is, that within the limits of the fair scope and subject of comment, a public writer has an immunity, so long as he is in the honest exercise of his right of public discussion. If this was not clearly asserted in the case, it seems to have been implied, and at all events was not denied.

The test is made the honest exercise of the right of free discussion as opposed to an abusive pretence of its exercise. In that sense the word was used by Lord Chief Justice Cockburn himself in the case of *Seymour v. Butterworth*,\* where he thus laid down the law :

“It is not disputed that the public conduct of a public man may be discussed with the fullest freedom. It may be made the subject of hostile criticism and of hostile animadversions, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty, and not made a means of promulgating slanderous and malicious accusations.”

That again is, it will be seen, accurately in accordance with the authorities. And the Lord Chief Justice went on in that case, speaking of our strictures on a corrupt system of parliamentary patronage :

“No doubt it may be deemed objectionable to have a number of those who should be free and independent representatives of the people always under a sense of favour and obligation to the Government of the day. Not only was this a fair matter for discussion, and within the province of a public writer ; but a public writer was fairly entitled, if, in his opinion, such a course of proceeding is detrimental to the independence of the Bar, to the independence of Parliament, and to the independence of the representatives of the people, to animadvert with severity upon the conduct of those who gave and of those who received such patronage.”

And though his Lordship seemed to qualify this as to the expression of opinion upon any particular instance—

\* 3 Foster & Finlason.

“But if he went beyond that, and asserted that a member of Parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did but for a corrupt understanding that he should receive a reward, it became a serious charge, and one which no man writing, whether in public or private, should venture to make against another ;”

—yet he does not say that it might not be privileged by the right of free discussion ; and of course whether it were so or not must depend upon the subject-matter of comment and the materials or grounds of inference it afforded in the particular case. And we confess that in that case we think the incidents alluded to were fit subjects of comment as to the connexion between the interviews with the Government and the vote on any particular occasion. What was the case of *Campbell v. Spottiswoode* ?

Dr. Campbell, the plaintiff, was editor and part proprietor of a religious newspaper, the *Ensign and Standard*. He had published a series of letters to Prince Albert, with the avowed object and effect of raising the circulation of those papers, as he said, by 100,000. He proposed to publish in his papers a series of letters on Chinese Missions ; and to invite the religious public to subscribe for at least an equal number of copies of his paper containing those letters, for the purpose of gratuitous distribution, in order, as he said, to promote the cause of Chinese Missions. To stimulate these subscriptions, he put forward announcements and appeals, of which these are specimens. Their scope is, it will be seen, simply this : to solicit public subscriptions to his paper, on the score of his own anxiety for the souls of the heathen.

“Co-operation is earnestly invited to aid in sending forth on all sides arguments and appeals calculated to awaken compassion for the lost millions of the race of China. . . . Fathers ! friends of the heathen, I am most anxious to enlist your good offices on behalf of four hundred millions of perishing souls. What zeal, what liberality are not demanded by the claims of four hundred millions of perishing souls.”

Such is the "matchless cause" for which he is moved to write a "Series of Letters." But this will be of no use unless circulated. And in order that they may be circulated, he asks a large amount of subscriptions to his paper containing them. That is, entirely on the score of the zeal which is consuming him; and which, of course, is to inspire these "Letters."

"The good to be anticipated from these Letters must depend on the extent of their circulation." . . . . "It is necessary that they should receive the widest possible diffusion." . . . . "Surely we need not despair of this; the promotion of the eternal welfare of one-third of the human race may well awaken the deepest compassion, and call forth the utmost energy of the remainder." "There is but one way of securing a really efficient circulation, and that is, for our generous friends to take the matter into their own hands. If they order direct from the office a number of copies for distribution, who can tell the benefit that may arise to the great cause! This is the first step," (*i. e.* the subscription,) "but to complete it, demands another (the distribution), which requires the good offices of our excellent publisher, which will be cheerfully rendered. Our friends have, therefore, only to transmit to him contributions for the purpose."

That is, they were to send the publisher the money, and rely on him to distribute the copies. Thus unlimited confidence was to be placed both in editor and publisher.

Speaking of his former Letters, the Doctor says:

"My friends, the friends of the truth as it is in Jesus, generously enabled me, through their subscriptions, to circulate in proper quarters 100,000 copies, which, it is calculated, have been more or less perused by one million of people. In the present case, however, if the movement shall be in any way proportioned to the theme, five times that number would be required!"

That is, 500,000 copies circulated, and perused by 5,000,000 of people! Such a circulation would, if secured, have made the *British Standard* wave indeed over a wide expanse of

moral dominion; and made the Doctor owner of one of the finest newspaper properties in this country. How far he ultimately succeeded, is not possible to say. After he had gone on some time, he informed his admirers that, "The free circulation had amounted to 22,000 copies;" that is, that number were subscribed for weekly (as we understand), to be circulated at his discretion. A double advantage; first, they are paid for by the subscribers; then he is at liberty to distribute them as he pleases; and every one of them is an advertiser of his paper, and enhances the value of his property.

Thus the Doctor represents it as the reason why the "friends of the heathen" should assist him, that he is burning with anxiety to enlist their aid on behalf of the perishing heathen. That, he solemnly assures them, is his object. That is his sole motive. He challenges attention to it. He invites scrutiny of it. He puts it in the van. He urges it as his great argument. He enlarges on the idea. He declares it overwhelms him.

"The idea of one-third of the human race seems to confound and overwhelm the mind."

Yet so intense is his zeal, that he addresses himself to the mighty task.

"As much as in me lies, therefore, I feel called upon to use the literary facilities so largely placed under my control to further the sublime enterprise."

And then he points out that this is only one mean to the end, and explains how he requires money.

"The Letters must be circulated and read, and for this I am wholly dependent on the good offices of the friends of the heathen."

The effect of these appeals by the Doctor, in person, was aided from time to time by the publication of letters, or extracts from letters, of pious persons who had been stimulated by these appeals to subscribe; all in the same style, and using

the same phraseology, "The Editor's admirable Letters," "The all-important subject," "May the Editor be abundantly strengthened and encouraged in this new effort for the glory of God, and the best interests of the perishing heathen." And again, "I would encourage Dr. Campbell in all his abounding labours of love. He is an honour to his country and a benefactor of man." And so on. Thus, after himself professing his overwhelming anxiety for the souls of the perishing heathen, as a reason for other people subscribing their money for the circulation of his paper—he introduces other, for the most part anonymous, writers, expressing their high admiration of his matchless zeal and "labours of love," and by their example seeks to invite others to a like liberality. "Beyond any man of his time he has displayed an intense and unquenchable zeal on behalf of China." And then in another place, by way of stimulating the liberality of friends of the heathen, he points to the munificent subscription of that gentleman. And then he proffers the aid of his publisher to distribute the papers,

"deeming nothing too much to further a cause so glorious; a cause which involves obedience to the Divine commands, the salvation of men, and the glory of God."

And he winds up this powerful appeal by

"commending this matter to the serious attention of the friends of the heathen, and earnestly soliciting their good offices."

That is, he asks their subscriptions on the score of his sincere zeal for the conversion of the heathen. We do not doubt it in the least. But then we say that by thus putting it before the public he made it a fit and fair subject for public comment, and could not complain if it was suggested, that it was not the sole motive.

Now, we repeat, and we declare sincerely, we do not doubt the Doctor's sincerity. But what we say is, that by taking this course, he made his motives and his aims, and the whole moral character of his proceeding, fit subject of public



stricture and public commentary. We say the whole of it was so. Not (as the Lord Chief Justice would have it) only a part of it. Not merely its feasibility, or its very probability of success, but its real aim, and motive, and end. Not merely its effect, but its object. Not merely the means proposed, but the moral character of the agencies and means employed, and the incitements and inducements held out. Because the whole depended upon the faith felt in the Doctor's anxiety for the souls of the heathen, as the sole motive he had in view. If there was any admixture of any other and more selfish motive, if the good of the paper was in the least in view, a public writer had a fair right to object to that admixture, and denounce it.

We say that there was a fair occasion for the discussion of every part of the materials thus presented for discussion; not merely the feasibility of the proposed plan, but the moral character of the means adopted for carrying it out, and especially the publication of letters, "all bearing the marks of the same style," all breathing such a tone of eulogy on the projector of the plan, all pointing to the most implicit confidence in him on account of his professed and assumed anxiety for the heathen; we say that all this, and especially the latter, the reality and genuineness of the feeling thus put forth as the moving principle of the whole, was fair subject of public discussion, with a special view to the question whether on the whole it was not probable that, in the language of the Lord Chief Justice himself, the collateral advantage to the paper was not present to the plaintiff's mind, and had not some influence upon him, and whether this probability did not raise a powerful argument against the moral propriety of the means thus adopted, and of this suspicious union between the secular and the spiritual.

We say that the whole of this was fair subject of discussion, and that there was a privileged occasion to a public writer to discuss all that was then set before the public, and the discussion of any part of it. And that the question as

to the limit of his right of discussion was not whether these materials might fairly, in the judgment of judge or jury, support any inference he drew therefrom, or any imputations he founded thereon, but whether they might not naturally arise in the mind of the writer, when honestly engaged in the discussion of these materials, or whether, on these materials, they might naturally enough suggest themselves to his mind in discussing them. If so, then we submit that as the right of discussion embraced them, so the privilege applied to the imputations relating to them, and that there would be no other question except whether there was in the manner of the discussion any evidence that there was not the honest exercise of the right, but an indulgence in reckless defamation which would be evidence of malice.

What were the imputations in the present case? We extract the material passages in the alleged libel with the notes of the learned reporters, who, it will be seen, consider it came strictly within the limits of fair comment.

“The Doctor refers frequently to Mr. Thompson as his authority, so frequently that we must own to having had a transitory suspicion that Mr. Thompson was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp’s acquaintance, that ‘there never was no such person.’ But as Mr. Thompson’s name is down for 5,000 copies of the *Ensign*, we must accept his identity as fully proved,\* and we hope the publisher of the *Ensign* is equally satisfied on the point. Certain it is, that Mr. Thompson knows more about China than anybody else in England.

“To spread the knowledge of the Gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation, is a most scandalous and flagitious act, and it is this act, we fear, we must charge against Dr. Campbell.†

\* So that here was a distinct disclaimer, as regards this name, of any idea of its being fictitious.

† This gives the key to the real meaning of the whole article, that the making out that the advancement of Christian missions was an object to be attained or promoted by subscribing to the plaintiff’s paper was a mere

Buy the letters, and save the heathen. About twenty-five letters will be 'required;' they must be circulated and read, and for this 'I am wholly dependent on the good offices of the friends of the heathen.' There is no disguise in all this. Letters from correspondents, all bearing the mark of one hand,\* put the matter on a very simple basis.

"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty.† Moreover, the well-known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking.‡ 'R. G.' takes 240 copies; 'A London Minister,' 120; 'An Old Soldier,' 100; and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier.'§

"Whatever may be the private views of the editor of the *Ensign*, there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor,|| more than an equivalent is provided in the freedom from doubts and suspicions and the sense of security that it confers. No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled, on many grounds, to respect; but now and then this very credulity may be turned to

pretext, "a scandalous and flagitious act," and an "imposture;" not that the imposture lay in fabricated subscriptions or fictitious letters, save only as a matter of mere inference arising from the similarity of tone or style.

\* This is the only passage which at all suggests a fabrication of letters, and it is done studiously by way of critical inference from the style of the letters, not by way of independent suggestion. The distinction is all-important. Why may not a public writer infer from the similarity of style in different letters or articles that they are from the same hand? There is no suggestion of a fraudulent intent in this passage.

† This is the "dodge" or "imposture" aimed at all through; *ut supra*.

‡ Here it is not at all suggested that they are not authentic, and the "device" is in publishing lists of subscriptions, equally a "device" whether real or not real.

§ This is evidently what the Lord Chief Justice called "mere banter," and meant that the Doctor was an "old soldier," *i. e.*, an experienced hand in such matters and in the practising of such "dodges" and "devices" as above alluded to, not that he forged the letter signed "An Old Soldier."

|| This alludes to the nature of the plaintiff's "plan," *ut supra*, and has no connexion with a suggestion as to forged letters or with any other imposture than as implied in the nature of his proposal or plan.

good account.\* Dr. Campbell is just now making use of it for a very practical purpose,† and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell has finished his 'Chinese Letters' he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be not doubt that he is making a very good thing indeed of the spiritual wants of the Chinese."‡

Now we confess we could scarcely ourselves conceive of a case more clearly within the fair limits of free discussion. And it was apparent that the plaintiff's advisers felt that if there were nothing but comments on and inferences from his own publications, the article was within these limits. For from the first they sought to fasten on the writer the responsibility of distinct and independent assertions or statements of his own, not by way of inference or observation. Thus :

"The plaintiff's attorney wrote to the *Saturday Review* to desire that an 'ample apology' should be inserted, with a declaration that there was reason to believe that 'the charges' made against him were utterly unfounded, such apology to be sent to him for approval, and to appear in the next number, in the same type as the libel, and in a similar position. The defendant's attorney wrote to request that the passages charged as libellous might be specified. The plaintiff's attorney in reply wrote that there could be no difficulty in discovering what those passages were, and that if his request were not complied with in the course of the morrow, he should take proceedings, for he could not submit to the imputation of being an 'impostor,' or 'guilty of scandalous and flagitious conduct,'" and he pointed in particular at the supposed imputation of fabricating letters, &c. "The defendant's attorney, in answer, wrote, 'It appears to us, from the context, that the words complained of are used

\* This refers to the scandalous and flagitious act first referred to, of representing the subscription to the paper as an act of religious duty.

† That is, by representing it as a religious duty.

‡ That is, by representing it as a religious duty to take his paper.

merely as part of a criticism on a newspaper article, and are not intended to attack Dr. Campbell's character. If you will point out any statements of matter of fact which you consider erroneous, it shall be corrected in the *Review*.' " (This was understating the case for the defendant, for his right was not merely criticism, but free discussion.) " The plaintiff's attorney, in reply, suggested that he and the publisher should meet the defendant's attorney, with all the books and documents, and satisfy them that the supposed imputations of fraud were erroneous. The defendant's attorney, in reply, denied in effect that there were any such imputations, and said that it would be better to point out in writing what was complained of. The reply to this on the part of the plaintiff's attorney was the writ in this action, in acknowledging which the defendant's attorney declared his regret that an opportunity had not been afforded of correcting any erroneous statement of matter of fact."

The plaintiff's case, however, at the trial was conducted on the assumption which had been made from the outset that the article made distinct and independent statements of matter of fact against the plaintiff, and his case at the trial was rested entirely on the view that the article imputed to him fabricated letters and fictitious subscription lists, and the plaintiff was himself called to disprove this, and the persons referred to were called and proved their own existence and the reality of their letters. In particular, Mr. Thompson, of Prior Park, the husband of the lady alluded to, was called as a witness, and it turned out that he was a friend of the plaintiff, and had promoted the "letters."

Now in no view was this evidence admissible, and we are surprised that it should have been received. There was no justification, and if there were any imputations in the way of direct and independent assertions, they must be taken to be untrue in fact. And as to malice, this was an action not against the writer, but the publisher; and evidence of malice in the former would be irrelevant in an action against the latter; added to which, mere evidence that the supposed

imputations were untrue would be no evidence of malice against either. And if it were meant to connect this evidence with the refusal to insert a contradiction or explanation, that was after the publication; and though it might, if brought home to the writer, have been evidence of precedent malice in him, it could not be so in an action against the publisher.

The effect of admitting this evidence was, of course, to produce the impression that there were independent statements, by the writer, of matters of fact, and not mere comments on matters arising out of the plaintiff's own propositions; and no doubt there were suggestions of inferences of fact, as well as of opinion, at all events in the construction which the Lord Chief Justice and the jury put upon the article; but on the principles we have laid down that would make no difference, because the right of free discussion would extend to the deduction of inferences of fact or the suggestion of matters of fact, provided they were within the scope of the subject-matter of discussion. The great question, then, was, what was the scope and subject of discussion; and that depends on the nature of the plaintiff's publications. But some how the attention of the Lord Chief Justice was drawn off from them, and fixed upon a totally different point—the question of actual belief in the writer; of the truth and fairness of his imputations.

To understand and do justice to the direction of the Lord Chief Justice, it is necessary to mark well the course which the case took, and above all the ground on which the defence was put, or understood to be put, at the trial. He was reminded of *Turnbull v. Bird*; but he was asked, in a general way, to put the question to the jury whether the writer honestly believed what he wrote. Now in the first place it is plain that, as a question of actual belief, there was no evidence on which he could put that question to the jury, especially as this was an action, not as in *Turnbull v. Bird* against the writer, but against the publisher; and the writer was not—perhaps could not be—called to prove his belief. And next as a question of

probable or reasonable ground for belief; that would not be material except as an ingredient in the question of malice; and that would not arise until the prior question was decided; which was, as we have seen, one of law—whether there was anything which could fairly form the subject of the discussion, and be any occasion for the imputations complained of.

The defence upheld in *Turnbull v. Bird*, and probably intended to be set up in *Campbell v. Spottiswoode*, was, that there was an occasion for the discussion of the very subject-matter of the particular imputation; and that, therefore, there was a lawful occasion and excuse for defamatory imputations naturally arising out of the honest exercise of the right of discussion thereon; and that, in the absence of personal malice, those imputations were protected, provided they were made in the honest exercise of that right; the test of which in that case was that they were honestly believed. So it was, there, all the prior points being established, and the action being against the writer, and the question of actual belief raised by evidence. That was a widely different thing from holding that the imputation was protected merely because honestly believed, which would not even show that they were honestly made, as they might have been made maliciously. All, however, turned on whether there was subject-matter for the particular imputations.

The Lord Chief Justice, as we conceive, rightly considered it to be for him to lay down as matter of law what was fit subject for discussion or fair subject of comment; and it would have been perfectly competent to him to tell the jury that such and such matters—not fairly arising out of the Doctor's publications—were not fit or fair subject of comment at all, whether fair or unfair, because not fairly or naturally arising out of the plaintiff's publications, and so not within the proper scope of public discussion at all. For it is always for the judge to define the limits of a privileged occasion. And this, we presume, he intended to do

when he laid it down, in effect, that it was only, in his opinion, the nature and character of the proposals, which was fit subject of public comment, because it was that alone, which arose on the face of the plaintiff's publications. We venture, however, to think either that the Lord Chief Justice erred in allowing far too narrow a scope to the subject of comment, as disclosed in these publications, or that he confounded the question of what was fair subject of comment with the very different question, what is fair comment?

The Lord Chief Justice thus defined the limits of fair comment, on the occasion :

"It was perfectly lawful for a public writer to say that it was an idle scheme, that it was a delusion to suppose that, by forcing the papers into circulation by free distribution, the great cause of missions would be promoted, and, in short, to denounce the whole scheme as pernicious and delusive. And if you think that this is all which has really been done in this case, then it is within the fair and legitimate scope of criticism, and then you ought to find your verdict for the defendant. But the question is whether the writer has not gone beyond these limits, and imputed to Dr. Campbell not merely that he has proposed a delusive and mischievous scheme, but that he has done so with the sordid motive of abusing the confidence of the public on subjects the most sacred, for the pitiful purpose of increasing the subscriptions to his newspaper. If you think so, then the case assumes a different character."

That is, then they are not to find for the defendant, because then the imputation would go beyond the limits which the Lord Chief Justice allowed to free discussion.

The Lord Chief Justice was no doubt right in taking it upon him to define the limits of the right of public discussion on the materials put forth, for it is always for the judge to define and declare a privileged occasion. And of course this would be in effect to direct a verdict for the plaintiff, subject to the opinion of the jury, on the question, libel or no libel, which is always for them, and what the Lord Chief



such discussion. The very distinction between public and private matter implies this. So in a case\* where the publisher of a newspaper charged the plaintiff with having shown, in prior publications "a motive which had overcome truth and honesty," and there was no justification, and only the general issue, Chief Justice Erle thus laid down the law with admirable accuracy and fidelity, and in the clear light of principle :

"This is an action which is not maintainable without malice, which means in law any wrong motive. Nothing is more important than to draw the line duly between fair discussion for the advancement of truth, and publications for the aspersion of personal character. The case of a servant is only an instance illustrating the legal principle upon which defamatory words may be justified by the occasion. This is a kind of case which is more rare, but is reducible to the same general principle, when the plaintiff and the defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public ; it is in such a case important to see if malice is made out against the party sued ; or if he has published only what he believed to be required for the interests of truth. If you are of opinion, upon the whole, that the defendant wrote what he did for the purpose of maintaining the truth sincerely, having that object in view, without any corrupt motive, and that the language he used, even although exaggerated, was prompted by a desire to maintain the truth, then you are at liberty to find the defendant not guilty."

The Chief Justice, it will be seen, treats the occasion as privileged, and the test he applies as to whether the publication of the particular expression was privileged, or whether they were not so reckless as to show malice, is as follows :

"Are the expressions used by the defendant in commenting upon the plaintiff's publication so intemperate as to satisfy you that he was actuated by an improper motive? Or are they such as under

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason.

the circumstances were not too strong? Was there not ground for saying what he did? Was not that a natural, though a rash, conclusion? Was it not a natural desire to correct a misrepresentation of fact, or was it the malicious and improper motive of injuring the plaintiff? \* In the latter case, find for the plaintiff; in the other case, for the defendant."

That is, the matter being public in its nature, the test of liability is made malice, and the test of malice excess in violence or virulence.

It has been seen that there is a close connexion between the rights of public discussion exercised orally and in the press. They are, indeed, only different forms or modes of exercise of the same right. The judges have more than once observed that there is no peculiar privilege to newspaper writers, and the right of free discussion of public matters is common to all men. No doubt this is so, and of course it follows that the same limits are to be assigned to the right of oral and of written discussion on public matters. Now, the very judge who tried *Campbell v. Spottiswoode* tried a case of oral exercise of the right of free discussion, in which he clearly and boldly laid down the law as we have here asserted it to be, viz., that the only limit to the exercise of the right is such excess as would be evidence of malice. In that case,† the defendant at a public meeting charged the plaintiff with having misappropriated the funds of the parish and applied them to his private use. It was contended that the occasion was protected, and that the words were privileged.‡ The Lord Chief Justice ruled thus:—

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason, Rep. 610.

† *George v. Goddard*, 2 Fost. and Finlason, 689.

‡ Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for re-election that he had misappropriated parish moneys while holding the office before:—*Held*, that the occasion was privileged, but that whether the words were so, would depend, not merely on whether they were wilfully false, but whether on the face of them they were so far beyond the occasion that the jury might fairly infer the occasion was merely *made use of* for the purpose of personal malice.—*George v. Goddard*, 2 Fost. and Finlason.

"COCKBURN, C. J.—I shall tell the jury that the occasion was privileged; but that the statement, though made on such occasion, will be unprivileged, if the making it was a malicious abuse of the occasion. They have a right to ascertain the real meaning and intention of the plaintiff in the words complained of, notwithstanding other words of courtesy and kindness.

"If the defendant simply meant to censure the conduct of the plaintiff as overseer, in relation to the law proceedings, and to the money borrowed for them, and repaid out of the rates, his statement was privileged by the occasion. If, on the other hand, he availed himself of the opportunity afforded him, by the meeting of the rate-payers, to bring forward a charge against the plaintiff, not merely of exceeding his duty, but of corruptly violating it, by applying the parish money to his own private purposes, the statement was not privileged, nor was it protected by the occasion. If the language of the defendant was entirely disproportioned to the circumstances under which he would be privileged by the occasion, the jury would be justified, I think, in inferring malicious motives, for they only would be the motives which would prompt such language; but, if it be plain to the jury that the defendant's language described only the excess of duty, without imputing private corruption, then I shall tell them the occasion and statement were privileged."

It follows from the above extract, if a public writer had, upon a publication by the plaintiff of a letter setting forth the matter, commented upon it to the effect of the above libel, it would have been equally protected, and within precisely the same limits.

The only distinction would be, that as the privilege of oral discussion would be restricted to a public meeting at which the matter might naturally, that is, fairly arise, so the privilege of printed discussion would in like manner be limited to the occasion of some publication in which it would fairly and naturally arise, that is, either an official or legal publication, or a publication by the plaintiff himself of some matter out of which the imputation might fairly or naturally arise. It would not be competent to a public speaker at a meeting

which had nothing to do with the matter to enter into a discussion of it. Neither would it be competent to a public writer, without waiting for any publication by the plaintiff, or some lawful authority, of some matter which made it relevant, of his own mere motion, to raise the question and publish the imputation. In either case the occasion must in that sense fairly, that is, naturally arise; but when it does so it is protected provided there is no excess.

This is the true and only indication of cases like *Davidson v. Duncan*, and *Popham v. Pickburn*, in which it has been held that publication of a report of defamatory observations at a vestry meeting, or of defamatory comments on a report presented at such meeting were not protected. The publication in each case was to all the world; and the words uttered at the vestry in one case, and the report presented to the vestry in the other, were publications limited to the vestry in each case, and such as would not fairly warrant a publication to the world. That was the real ground of the decision in each case. It was not held (as was supposed in the first case) that a report of defamatory observations at a public meeting could not be protected, for what it would be competent to a public speaker to say to all the world (could they be present at a public meeting), it would be surely competent to a public writer to publish to all the world in a newspaper. But neither the one right nor the other would extend to matter limited to a particular body or vestry.

It is to be observed, however, that even a matter arising before a particular body may have a public interest, such as will make the whole of it fair subject of public comment. This was one great point determined in the case of *Seymour v. Butterworth*, as to an inquiry before the Benchers of an Inn. Another point, and quite as important, was there determined, namely, that even the private character and conduct of a public man may be fit subject of public discussion, even as to matters not involving moral misconduct, as, for instance, debt. In that case, the able counsel for the plaintiff, Mr. Lush,

than whom no one could be more safely relied on for a fair and correct statement of the law, seems only to have relied on the allusions to private conduct, and on evidence of malice. He said :

“I shall ask whether it is a fair and legitimate comment upon a man’s public career, or whether it is not a malignant and studied attack upon his professional life, dictated by private ends. I am here not to say one word against the liberty of the press ; on the contrary, I hold that, as Englishmen, we have no greater social right than the right of free discussion ; still it is necessary for its very maintenance that it should be guarded and preserved within its proper province. I admit that in the newspapers the conduct of every public man, from the highest in the realm down to the lowest, may be freely discussed. The conduct of any member of Parliament in his public capacity may be discussed ; nay, the very investigation in which we are now engaged may be fully criticised. But men must not go beyond that : if they invade the sanctity of private life, and groundlessly impute corruption in the relations of that private life, then the liberty of the press is abused, and the interference of the law may be justly claimed. If this publication had contented itself with a mere criticism upon Mr. Seymour’s Parliamentary conduct, if *bonâ fide*, however severe it may have been, it would not be liable to an action ; and the same is true of similar criticisms upon his professional career. But rumours, mere rumours of charges which had taken no fixed shape, such as these, no man had any right to embody in a published attack against any man. Nevertheless, this writer has done so, and he has chosen to embody every rumour which he found afloat in his indictment against Mr. Seymour. I ask you to consider, is it not manifest that the man who penned this article was influenced from first to last by personal motives to endeavour to crush Mr. Seymour, socially, politically, and professionally.” \*

That is to say, (as we collect,) the learned counsel did not consider that his client could complain of the strictures, however severe, on his conduct in Parliament, but only of the embodiment of rumours as to the charges of private mis-

\* Foster & Finlason.

good account.\* Dr. Campbell is just now making use of it for a very practical purpose,† and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell has finished his 'Chinese Letters' he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be not doubt that he is making a very good thing indeed of the spiritual wants of the Chinese."‡

Now we confess we could scarcely ourselves conceive of a case more clearly within the fair limits of free discussion. And it was apparent that the plaintiff's advisers felt that if there were nothing but comments on and inferences from his own publications, the article was within these limits. For from the first they sought to fasten on the writer the responsibility of distinct and independent assertions or statements of his own, not by way of inference or observation. Thus :

"The plaintiff's attorney wrote to the *Saturday Review* to desire that an 'ample apology' should be inserted, with a declaration that there was reason to believe that 'the charges' made against him were utterly unfounded, such apology to be sent to him for approval, and to appear in the next number, in the same type as the libel, and in a similar position. The defendant's attorney wrote to request that the passages charged as libellous might be specified. The plaintiff's attorney in reply wrote that there could be no difficulty in discovering what those passages were, and that if his request were not complied with in the course of the morrow, he should take proceedings, for he could not submit to the imputation of being an 'impostor,' or 'guilty of scandalous and flagitious conduct,'" and he pointed in particular at the supposed imputation of fabricating letters, &c. "The defendant's attorney, in answer, wrote, 'It appears to us, from the context, that the words complained of are used

\* This refers to the scandalous and flagitious act first referred to, of representing the subscription to the paper as an act of religious duty.

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merely as part of a criticism on a newspaper article, and are not intended to attack Dr. Campbell's character. If you will point out any statements of matter of fact which you consider erroneous, it shall be corrected in the *Review*." (This was understating the case for the defendant, for his right was not merely criticism, but free discussion.) "The plaintiff's attorney, in reply, suggested that he and the publisher should meet the defendant's attorney, with all the books and documents, and satisfy them that the supposed imputations of fraud were erroneous. The defendant's attorney, in reply, denied in effect that there were any such imputations, and said that it would be better to point out in writing what was complained of. The reply to this on the part of the plaintiff's attorney was the writ in this action, in acknowledging which the defendant's attorney declared his regret that an opportunity had not been afforded of correcting any erroneous statement of matter of fact."

The plaintiff's case, however, at the trial was conducted on the assumption which had been made from the outset that the article made distinct and independent statements of matter of fact against the plaintiff, and his case at the trial was rested entirely on the view that the article imputed to him fabricated letters and fictitious subscription lists, and the plaintiff was himself called to disprove this, and the persons referred to were called and proved their own existence and the reality of their letters. In particular, Mr. Thompson, of Prior Park, the husband of the lady alluded to, was called as a witness, and it turned out that he was a friend of the plaintiff, and had promoted the "letters."

Now in no view was this evidence admissible, and we are surprised that it should have been received. There was no justification, and if there were any imputations in the way of direct and independent assertions, they must be taken to be untrue in fact. And as to malice, this was an action not against the writer, but the publisher; and evidence of malice in the former would be irrelevant in an action against the latter; added to which, mere evidence that the supposed

or to past declarations or notorious obligations of the party whose acts are the subject of discussion. All this, however, must depend, of course, upon the particular circumstances of each case. The great point for which we contend is, that within the limits of the fair scope and subject of comment, a public writer has an immunity, so long as he is in the honest exercise of his right of public discussion. If this was not clearly asserted in the case, it seems to have been implied, and at all events was not denied.

The test is made the honest exercise of the right of free discussion as opposed to an abusive pretence of its exercise. In that sense the word was used by Lord Chief Justice Cockburn himself in the case of *Seymour v. Butterworth*,\* where he thus laid down the law :

“It is not disputed that the public conduct of a public man may be discussed with the fullest freedom. It may be made the subject of hostile criticism and of hostile animadversions, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty, and not made a means of promulgating slanderous and malicious accusations.”

That again is, it will be seen, accurately in accordance with the authorities. And the Lord Chief Justice went on in that case, speaking of our strictures on a corrupt system of parliamentary patronage :

“No doubt it may be deemed objectionable to have a number of those who should be free and independent representatives of the people always under a sense of favour and obligation to the Government of the day. Not only was this a fair matter for discussion, and within the province of a public writer ; but a public writer was fairly entitled, if, in his opinion, such a course of proceeding is detrimental to the independence of the Bar, to the independence of Parliament, and to the independence of the representatives of the people, to animadvert with severity upon the conduct of those who gave and of those who received such patronage.”

And though his Lordship seemed to qualify this as to the expression of opinion upon any particular instance—

\* 3 Foster & Finlason.



"But if he went beyond that, and asserted that a member of Parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did but for a corrupt understanding that he should receive a reward, it became a serious charge, and one which no man writing, whether in public or private, should venture to make against another ;"

—yet he does not say that it might not be privileged by the right of free discussion ; and of course whether it were so or not must depend upon the subject-matter of comment and the materials or grounds of inference it afforded in the particular case. And we confess that in that case we think the incidents alluded to were fit subjects of comment as to the connexion between the interviews with the Government and the vote on any particular occasion. What was the case of *Campbell v. Spottiswoode* ?

Dr. Campbell, the plaintiff, was editor and part proprietor of a religious newspaper, the *Ensign and Standard*. He had published a series of letters to Prince Albert, with the avowed object and effect of raising the circulation of those papers, as he said, by 100,000. He proposed to publish in his papers a series of letters on Chinese Missions ; and to invite the religious public to subscribe for at least an equal number of copies of his paper containing those letters, for the purpose of gratuitous distribution, in order, as he said, to promote the cause of Chinese Missions. To stimulate these subscriptions, he put forward announcements and appeals, of which these are specimens. Their scope is, it will be seen, simply this : to solicit public subscriptions to his paper, on the score of his own anxiety for the souls of the heathen.

"Co-operation is earnestly invited to aid in sending forth on all sides arguments and appeals calculated to awaken compassion for the lost millions of the race of China. . . . Fathers ! friends of the heathen, I am most anxious to enlist your good offices on behalf of four hundred millions of perishing souls. What zeal, what liberality are not demanded by the claims of four hundred millions of perishing souls."

Such is the "matchless cause" for which he is moved to write a "Series of Letters." But this will be of no use unless circulated. And in order that they may be circulated, he asks a large amount of subscriptions to his paper containing them. That is, entirely on the score of the zeal which is consuming him; and which, of course, is to inspire these "Letters."

"The good to be anticipated from these Letters must depend on the extent of their circulation." . . . . "It is necessary that they should receive the widest possible diffusion." . . . . "Surely we need not despair of this; the promotion of the eternal welfare of one-third of the human race may well awaken the deepest compassion, and call forth the utmost energy of the remainder." "There is but one way of securing a really efficient circulation, and that is, for our generous friends to take the matter into their own hands. If they order direct from the office a number of copies for distribution, who can tell the benefit that may arise to the great cause! This is the first step," (*i. e.* the subscription,) "but to complete it, demands another (the distribution), which requires the good offices of our excellent publisher, which will be cheerfully rendered. Our friends have, therefore, only to transmit to him contributions for the purpose."

That is, they were to send the publisher the money, and rely on him to distribute the copies. Thus unlimited confidence was to be placed both in editor and publisher.

Speaking of his former Letters, the Doctor says:

"My friends, the friends of the truth as it is in Jesus, generously enabled me, through their subscriptions, to circulate in proper quarters 100,000 copies, which, it is calculated, have been more or less perused by one million of people. In the present case, however, if the movement shall be in any way proportioned to the theme, five times that number would be required!"

That is, 500,000 copies circulated, and perused by 5,000,000 of people! Such a circulation would, if secured, have made the *British Standard* wave indeed over a wide expanse of

moral dominion; and made the Doctor owner of one of the finest newspaper properties in this country. How far he ultimately succeeded, is not possible to say. After he had gone on some time, he informed his admirers that, "The free circulation had amounted to 22,000 copies;" that is, that number were subscribed for weekly (as we understand), to be circulated at his discretion. A double advantage; first, they are paid for by the subscribers; then he is at liberty to distribute them as he pleases; and every one of them is an advertiser of his paper, and enhances the value of his property.

Thus the Doctor represents it as the reason why the "friends of the heathen" should assist him, that he is burning with anxiety to enlist their aid on behalf of the perishing heathen. That, he solemnly assures them, is his object. That is his sole motive. He challenges attention to it. He invites scrutiny of it. He puts it in the van. He urges it as his great argument. He enlarges on the idea. He declares it overwhelms him.

"The idea of one-third of the human race seems to confound and overwhelm the mind."

Yet so intense is his zeal, that he addresses himself to the mighty task.

"As much as in me lies, therefore, I feel called upon to use the literary facilities so largely placed under my control to further the sublime enterprise."

And then he points out that this is only one mean to the end, and explains how he requires money.

"The Letters must be circulated and read, and for this I am wholly dependent on the good offices of the friends of the heathen."

The effect of these appeals by the Doctor, in person, was aided from time to time by the publication of letters, or extracts from letters, of pious persons who had been stimulated by these appeals to subscribe; all in the same style, and using

the same phraseology, "The Editor's admirable Letters," "The all-important subject," "May the Editor be abundantly strengthened and encouraged in this new effort for the glory of God, and the best interests of the perishing heathen." And again, "I would encourage Dr. Campbell in all his abounding labours of love. He is an honour to his country and a benefactor of man." And so on. Thus, after himself professing his overwhelming anxiety for the souls of the perishing heathen, as a reason for other people subscribing their money for the circulation of his paper—he introduces other, for the most part anonymous, writers, expressing their high admiration of his matchless zeal and "labours of love," and by their example seeks to invite others to a like liberality. "Beyond any man of his time he has displayed an intense and unquenchable zeal on behalf of China." And then in another place, by way of stimulating the liberality of friends of the heathen, he points to the munificent subscription of that gentleman. And then he proffers the aid of his publisher to distribute the papers,

"deeming nothing too much to further a cause so glorious; a cause which involves obedience to the Divine commands, the salvation of men, and the glory of God."

And he winds up this powerful appeal by

"commending this matter to the serious attention of the friends of the heathen, and earnestly soliciting their good offices."

That is, he asks their subscriptions on the score of his sincere zeal for the conversion of the heathen. We do not doubt it in the least. But then we say that by thus putting it before the public he made it a fit and fair subject for public comment, and could not complain if it was suggested, that it was not the sole motive.

Now, we repeat, and we declare sincerely, we do not doubt the Doctor's sincerity. But what we say is, that by taking this course, he made his motives and his aims, and the whole moral character of his proceeding, fit subject of public

stricture and public commentary. We say the whole of it was so. Not (as the Lord Chief Justice would have it) only a part of it. Not merely its feasibility, or its very probability of success, but its real aim, and motive, and end. Not merely its effect, but its object. Not merely the means proposed, but the moral character of the agencies and means employed, and the incitements and inducements held out. Because the whole depended upon the faith felt in the Doctor's anxiety for the souls of the heathen, as the sole motive he had in view. If there was any admixture of any other and more selfish motive, if the good of the paper was in the least in view, a public writer had a fair right to object to that admixture, and denounce it.

We say that there was a fair occasion for the discussion of every part of the materials thus presented for discussion; not merely the feasibility of the proposed plan, but the moral character of the means adopted for carrying it out, and especially the publication of letters, "all bearing the marks of the same style," all breathing such a tone of eulogy on the projector of the plan, all pointing to the most implicit confidence in him on account of his professed and assumed anxiety for the heathen; we say that all this, and especially the latter, the reality and genuineness of the feeling thus put forth as the moving principle of the whole, was fair subject of public discussion, with a special view to the question whether on the whole it was not probable that, in the language of the Lord Chief Justice himself, the collateral advantage to the paper was not present to the plaintiff's mind, and had not some influence upon him, and whether this probability did not raise a powerful argument against the moral propriety of the means thus adopted, and of this suspicious union between the secular and the spiritual.

We say that the whole of this was fair subject of discussion, and that there was a privileged occasion to a public writer to discuss all that was then set before the public, and the discussion of any part of it. And that the question as

to the limit of his right of discussion was not whether these materials might fairly, in the judgment of judge or jury, support any inference he drew therefrom, or any imputations he founded thereon, but whether they might not naturally arise in the mind of the writer, when honestly engaged in the discussion of these materials, or whether, on these materials, they might naturally enough suggest themselves to his mind in discussing them. If so, then we submit that as the right of discussion embraced them, so the privilege applied to the imputations relating to them, and that there would be no other question except whether there was in the manner of the discussion any evidence that there was not the honest exercise of the right, but an indulgence in reckless defamation which would be evidence of malice.

What were the imputations in the present case? We extract the material passages in the alleged libel with the notes of the learned reporters, who, it will be seen, consider it came strictly within the limits of fair comment.

“The Doctor refers frequently to Mr. Thompson as his authority, so frequently that we must own to having had a transitory suspicion that Mr. Thompson was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp’s acquaintance, that ‘there never was no such person.’ But as Mr. Thompson’s name is down for 5,000 copies of the *Ensign*, we must accept his identity as fully proved,\* and we hope the publisher of the *Ensign* is equally satisfied on the point. Certain it is, that Mr. Thompson knows more about China than anybody else in England.

“To spread the knowledge of the Gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation, is a most scandalous and flagitious act, and it is this act, we fear, we must charge against Dr. Campbell.†

\* So that here was a distinct disclaimer, as regards this name, of any idea of its being fictitious.

† This gives the key to the real meaning of the whole article, that the making out that the advancement of Christian missions was an object to be attained or promoted by subscribing to the plaintiff’s paper was a mere

Buy the letters, and save the heathen. About twenty-five letters will be 'required;' they must be circulated and read, and for this 'I am wholly dependant on the good offices of the friends of the heathen.' There is no disguise in all this. Letters from correspondents, all bearing the mark of one hand,\* put the matter on a very simple basis.

"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty.† Moreover, the well-known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking.‡ 'R. G.' takes 240 copies; 'A London Minister,' 120; 'An Old Soldier,' 100; and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier.'§

"Whatever may be the private views of the editor of the *Ensign*, there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor,|| more than an equivalent is provided in the freedom from doubts and suspicions and the sense of security that it confers. No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled, on many grounds, to respect; but now and then this very credulity may be turned to

pretext, "a scandalous and flagitious act," and an "imposture;" not that the imposture lay in fabricated subscriptions or fictitious letters, save only as a matter of mere inference arising from the similarity of tone or style.

\* This is the only passage which at all suggests a fabrication of letters, and it is done studiously by way of critical inference from the style of the letters, not by way of independent suggestion. The distinction is all-important. Why may not a public writer infer from the similarity of style in different letters or articles that they are from the same hand? There is no suggestion of a fraudulent intent in this passage.

† This is the "dodge" or "imposture" aimed at all through; *ut supra*.

‡ Here it is not at all suggested that they are not authentic, and the "device" is in publishing lists of subscriptions, equally a "device" whether real or not real.

§ This is evidently what the Lord Chief Justice called "mere banter," and meant that the Doctor was an "old soldier," i. e., an experienced hand in such matters and in the practising of such "dodges" and "devices" as above alluded to, not that he forged the letter signed "An Old Soldier."

|| This alludes to the nature of the plaintiff's "plan," *ut supra*, and has no connexion with a suggestion as to forged letters or with any other imposture than as implied in the nature of his proposal or plan.

good account.\* Dr. Campbell is just now making use of it for a very practical purpose,† and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell has finished his 'Chinese Letters' he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be not doubt that he is making a very good thing indeed of the spiritual wants of the Chinese."‡

Now we confess we could scarcely ourselves conceive of a case more clearly within the fair limits of free discussion. And it was apparent that the plaintiff's advisers felt that if there were nothing but comments on and inferences from his own publications, the article was within these limits. For from the first they sought to fasten on the writer the responsibility of distinct and independent assertions or statements of his own, not by way of inference or observation. Thus :

"The plaintiff's attorney wrote to the *Saturday Review* to desire that an 'ample apology' should be inserted, with a declaration that there was reason to believe that 'the charges' made against him were utterly unfounded, such apology to be sent to him for approval, and to appear in the next number, in the same type as the libel, and in a similar position. The defendant's attorney wrote to request that the passages charged as libellous might be specified. The plaintiff's attorney in reply wrote that there could be no difficulty in discovering what those passages were, and that if his request were not complied with in the course of the morrow, he should take proceedings, for he could not submit to the imputation of being an 'impostor,' or 'guilty of scandalous and flagitious conduct,'" and he pointed in particular at the supposed imputation of fabricating letters, &c. "The defendant's attorney, in answer, wrote, 'It appears to us, from the context, that the words complained of are used

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merely as part of a criticism on a newspaper article, and are not intended to attack Dr. Campbell's character. If you will point out any statements of matter of fact which you consider erroneous, it shall be corrected in the *Review*." (This was understating the case for the defendant, for his right was not merely criticism, but free discussion.) "The plaintiff's attorney, in reply, suggested that he and the publisher should meet the defendant's attorney, with all the books and documents, and satisfy them that the supposed imputations of fraud were erroneous. The defendant's attorney, in reply, denied in effect that there were any such imputations, and said that it would be better to point out in writing what was complained of. The reply to this on the part of the plaintiff's attorney was the writ in this action, in acknowledging which the defendant's attorney declared his regret that an opportunity had not been afforded of correcting any erroneous statement of matter of fact."

The plaintiff's case, however, at the trial was conducted on the assumption which had been made from the outset that the article made distinct and independent statements of matter of fact against the plaintiff, and his case at the trial was rested entirely on the view that the article imputed to him fabricated letters and fictitious subscription lists, and the plaintiff was himself called to disprove this, and the persons referred to were called and proved their own existence and the reality of their letters. In particular, Mr. Thompson, of Prior Park, the husband of the lady alluded to, was called as a witness, and it turned out that he was a friend of the plaintiff, and had promoted the "letters."

Now in no view was this evidence admissible, and we are surprised that it should have been received. There was no justification, and if there were any imputations in the way of direct and independent assertions, they must be taken to be untrue in fact. And as to malice, this was an action not against the writer, but the publisher; and evidence of malice in the former would be irrelevant in an action against the latter; added to which, mere evidence that the supposed

imputations were untrue would be no evidence of malice against either. And if it were meant to connect this evidence with the refusal to insert a contradiction or explanation, that was after the publication; and though it might, if brought home to the writer, have been evidence of precedent malice in him, it could not be so in an action against the publisher.

The effect of admitting this evidence was, of course, to produce the impression that there were independent statements, by the writer, of matters of fact, and not mere comments on matters arising out of the plaintiff's own propositions; and no doubt there were suggestions of inferences of fact, as well as of opinion, at all events in the construction which the Lord Chief Justice and the jury put upon the article; but on the principles we have laid down that would make no difference, because the right of free discussion would extend to the deduction of inferences of fact or the suggestion of matters of fact, provided they were within the scope of the subject-matter of discussion. The great question, then, was, what was the scope and subject of discussion; and that depends on the nature of the plaintiff's publications. But some how the attention of the Lord Chief Justice was drawn off from them, and fixed upon a totally different point—the question of actual belief in the writer; of the truth and fairness of his imputations.

To understand and do justice to the direction of the Lord Chief Justice, it is necessary to mark well the course which the case took, and above all the ground on which the defence was put, or understood to be put, at the trial. He was reminded of *Turnbull v. Bird*; but he was asked, in a general way, to put the question to the jury whether the writer honestly believed what he wrote. Now in the first place it is plain that, as a question of actual belief, there was no evidence on which he could put that question to the jury, especially as this was an action, not as in *Turnbull v. Bird* against the writer, but against the publisher; and the writer was not—perhaps could not be—called to prove his belief. And next as a question of

probable or reasonable ground for belief; that would not be material except as an ingredient in the question of malice; and that would not arise until the prior question was decided; which was, as we have seen, one of law—whether there was anything which could fairly form the subject of the discussion, and be any occasion for the imputations complained of.

The defence upheld in *Turnbull v. Bird*, and probably intended to be set up in *Campbell v. Spottiswoode*, was, that there was an occasion for the discussion of the very subject-matter of the particular imputation; and that, therefore, there was a lawful occasion and excuse for defamatory imputations naturally arising out of the honest exercise of the right of discussion thereon; and that, in the absence of personal malice, those imputations were protected, provided they were made in the honest exercise of that right; the test of which in that case was that they were honestly believed. So it was, there, all the prior points being established, and the action being against the writer, and the question of actual belief raised by evidence. That was a widely different thing from holding that the imputation was protected merely because honestly believed, which would not even show that they were honestly made, as they might have been made maliciously. All, however, turned on whether there was subject-matter for the particular imputations.

The Lord Chief Justice, as we conceive, rightly considered it to be for him to lay down as matter of law what was fit subject for discussion or fair subject of comment; and it would have been perfectly competent to him to tell the jury that such and such matters—not fairly arising out of the Doctor's publications—were not fit or fair subject of comment at all, whether fair or unfair, because not fairly or naturally arising out of the plaintiff's publications, and so not within the proper scope of public discussion at all. For it is always for the judge to define the limits of a privileged occasion. And this, we presume, he intended to do

when he laid it down, in effect, that it was only, in his opinion, the nature and character of the proposals, which was fit subject of public comment, because it was that alone, which arose on the face of the plaintiff's publications. We venture, however, to think either that the Lord Chief Justice erred in allowing far too narrow a scope to the subject of comment, as disclosed in these publications, or that he confounded the question of what was fair subject of comment with the very different question, what is fair comment?

The Lord Chief Justice thus defined the limits of fair comment, on the occasion :

“ It was perfectly lawful for a public writer to say that it was an idle scheme, that it was a delusion to suppose that, by forcing the papers into circulation by free distribution, the great cause of missions would be promoted, and, in short, to denounce the whole scheme as pernicious and delusive. And if you think that this is all which has really been done in this case, then it is within the fair and legitimate scope of criticism, and then you ought to find your verdict for the defendant. But the question is whether the writer has not gone beyond these limits, and imputed to Dr. Campbell not merely that he has proposed a delusive and mischievous scheme, but that he has done so with the sordid motive of abusing the confidence of the public on subjects the most sacred, for the pitiful purpose of increasing the subscriptions to his newspaper. If you think so, then the case assumes a different character.”

That is, then they are not to find for the defendant, because then the imputation would go beyond the limits which the Lord Chief Justice allowed to free discussion.

The Lord Chief Justice was no doubt right in taking it upon him to define the limits of the right of public discussion on the materials put forth, for it is always for the judge to define and declare a privileged occasion. And of course this would be in effect to direct a verdict for the plaintiff, subject to the opinion of the jury, on the question, libel or no libel, which is always for them, and what the Lord Chief

Justice must be supposed to have laid down as matter of law, was, that there was no lawful excuse or occasion for the imputations supposed to have been made. No doubt that was for him; because lawful excuse is for the judge, while libel or no libel is for the jury. Still there is so much the air of an appeal to the jury on the question, and there is so much of observation on the fairness of the imputations, that we have some suspicion that the Lord Chief Justice may have either confounded the question, of what was the fair subject of discussion, with the question whether the imputations were fair, or may have supposed that the former question would depend on whether the imputations were fair and well founded; which we conceive was neither for the Court nor for the jury, but for the writer—assuming him to have a right for the discussion of the particular matter, and to have honestly exercised his right, because then he would, we conceive, have a privilege for any imputations not so unfair as to be malicious. The Court *in banco*, beyond all doubt, gave countenance to the idea that the inferences or imputations must be fair or well founded; which supports our impression that the Lord Chief Justice so meant it, though that leaves it in great doubt whether he meant that for the jury, or decided it himself. He certainly did not leave it to the jury; and if he decided it himself as matter of law, then it could only have been because he supposed that the right of discussion would depend, not only on whether the particular matters would naturally arise out of the discussion of the materials put forth, but would fairly, in his judgment, support the particular imputations; which we conceive to be quite erroneous.

The question for the judge in such cases, we submit, is simply to say whether, as matter of law, the imputations are so far connected with, and so far arise out of any of the subjects of discussion, that a writer might honestly have been led to make them in the course of discussion on those subjects, which is quite a different thing from determining whether

they are fair and well founded, an extremely anomalous issue, and very difficult to distinguish from one of actual truth. But the question in discussion is not actual but apparent truth; and that, not in the opinion of a lawyer, or even a body of laymen, considering the matter some time afterwards, but in the mind of the writer, as he might view it when honestly exercising the right of free discussion. It is for the jury to say whether, in point of fact, he was so honestly exercising his right. It is for the judge to say, whether the particular matters are so far connected with, and so far arise out of, the subjects of discussion, that a public writer might honestly, in discussing these subjects, make such imputations. All that was put forth was fit subject for public discussion: simply because the Doctor made it. It was he who made public profession of his anxiety for the safety of the heathen, and made that the very basis of his scheme. It was to enable his zeal to shape itself in earnest appeals to his fellow Christians that he asked the subscriptions of the "friends of the heathen." He, as thirsting for the souls of the heathen, asked those friends to assist him with their money in order to urge others to save those souls. Obviously everything turned on that anxiety for the heathen's souls. All must depend on its depth, intensity, and strength. It was the consideration, so to speak, which the friends of the heathen were to have for their money; they were to have the benefit of his appeals to others. The efficacy and energy of those appeals must depend evidently on the strength of his zeal, and that upon its purity. To the exact extent to which it was alloyed, if at all, by any other motive or aim, to that extent it must be weakened, and the energy and tone of his appeals diminished. That, then, was the most important point of all; it was that which alone, in any point of view, made the matter worth public discussion. But that the Lord Chief Justice excluded from discussion; and he laid it down as law, that it could not be suggested that the motive of a man in putting forth public proposals to subscribe to his own paper, and thus improve his own property, was

partly to produce that effect, although it will be seen the Lord Chief Justice himself avowed his belief that it was so, and said that a public writer might naturally suppose that it was so.

“And it is said that the circumstances were such as not only to entitle the writers of the *Review* to criticise in a hostile spirit the scheme of the plaintiff, but also to impute to him sordid and base motives in putting it forward, for that it is obvious that it could do good to nobody but the proprietors of the paper. I own, however, that my view of the law does not accord with this. A public writer is fully entitled to comment upon the conduct of a public man, and this was a public matter and a fair subject of comment. But it cannot be said that, because a man is a public man, a public writer is entitled not only to pass a judgment upon his conduct, but to ascribe to him corrupt and dishonest motives. That, in my view, is not the law, and the privilege of comment does not go to that extent.”

Nor was it contended that it did. Nor is it contended. Nor has it ever been contended, that merely “because a man is a public man” a public writer is entitled to ascribe to him corrupt and dishonest motives. Nor was it attempted here to impute to Dr. Campbell “corrupt and dishonest motives:” for it is neither “corrupt nor dishonest” for a man to seek to circulate his paper by putting what he sincerely believes to be very excellent matter into it. “Corrupt and dishonest” were epithets introduced by the Lord Chief Justice, not by the Reviewer. What was and is contended is this, that when a man makes a public profession of his motives, and a public exposition of a scheme based upon those professed motives; and a scheme which, obviously, as a simple matter of fact, will tend to promote his own worldly advantage; and propounds, as means for the furtherance of his professed object, pecuniary subscriptions or donations to himself; that then the whole of what he thus puts forth is fit subject for public discussion,—means, motives, and all,—the whole being so closely connected, and so put forth together as elements

of the scheme, that the real, true nature, and character of the scheme depends as much on motives as on means; and the value of the means depends almost entirely on the motives. This was what was contended; and this is what we contend and what we conceive to be clearly and beyond all doubt the law. And if we wanted confirmation of our conviction, we should find it in the singular inappositeness of the illustrations or analogies adduced by the Lord Chief Justice, himself so clear-headed and logical, in support of his view. They are obviously so utterly inapplicable, so entirely the opposite of the case in hand, that they suggest the unavoidable inference that the lucid intellect of the Lord Chief Justice has been distracted and drawn away from the real question at issue, otherwise he never could have dealt with it so inappropriately.

“Take the case of a statesman. His public conduct is open to criticism in speeches or in writings. But has anyone a right to say that he has sold himself, or that he has been inspired by base and sordid motives, unless prepared to justify those allegations as true?” [That is, if there is nothing to lead thereto.]

“Take the case of a general in command of a fortress, who has surrendered it earlier than the necessity of the case, in the opinion of others, required. His conduct in so doing would be open to the most severe criticism, but would there be a right to say that he had betrayed the fortress into the hands of the enemy for a corrupt consideration? Surely not.”

“Take the case of a treaty concluded by a statesman with a foreign power; suppose its terms to be disastrous to the country. Its terms would be open to the most severe criticism and the most righteous condemnation; but would there be a right to say that the statesman had sold his country? I think not.”

And so, with all respect, think we. There is no possible doubt, in these cases, that the libels would be most malignant and inexcusable. Why? Because there would be, in the cases supposed,—the voluntary, arbitrary, gratuitous, utterly unwarrantable imputation of corrupt motives, for acts, done



in the discharge of public duty, which the law presumes to have been done honestly, and without the least colour of occasion, so far as appears; even for the discussion of the motive at all, much less for the imputation of bad motive.

But, to make these cases at all analogous to the present, we must abstract from them that element which entirely distinguishes them—the element of public duty—and we must also add the element which gives to the present class of cases all their distinctive character, viz., the public exposition of the man's motives, and the propounding of them as the basis of proposals, partly, (as a mere matter of fact, beyond all doubt,) for his own benefit. Suppose the minister chose to publish his correspondence, or his speeches, and that a public writer, commenting thereon, and upon expositions of the statesman's motives, and comparing them with other matters of admitted facts and dates, &c., deduced inferences conveying imputations of motives partly selfish, that would be more like the present case; and who can doubt it would be a case of privileged comment? But even that would not be this case, unless the minister's acts were not done in the discharge of public duty, but merely in the ordinary pursuit of his political vocation or career—as, making a popular speech just before an election, or proposing a particular measure at a particular conjuncture, or the like. And who will venture to say that the liberty of fair comment on public matters like this would not extend to sarcastic strictures on the minister's speeches, suggesting, with reference to time and other circumstances, that the motives for such and such measures or movements were not unalloyed patriotism, but mingled with some desire to retain office, or to regain place? Nobody knows better than the Lord Chief Justice, who himself has filled a distinguished position in Parliament, that such imputations are within the acknowledged liberty of free discussion, both in Parliament and the press. And when he puts the case of a particular imputation, that a minister has sold himself for so much hard cash, he puts a case which happily is not

likely ever to occur, even in any one's imagination, except as an illustration in reasoning. But if there were any public action by a public man which should give any kind of colour to the charge—as in the well-known case of O'Connell's celebrated letter to Raphael about the seat for Carlow—"say £2000,"—beyond all doubt, such an imputation, even of pecuniary corruption, might legally be made; and, in the instance we have mentioned, was made, by the whole press of England, and made with perfect impunity, and without a doubt of its legality. The question whether an imputation is excused by the privilege of free public discussion, depends on just the same principle as would decide whether it would be protected by the privilege of private communication, viz., whether it was within, or went beyond, the occasion—that is, whether it arose naturally out of the subject-matter of discussion, or whether it went so far out of it, and away from it, as to be malicious. It would not depend merely on its own absolute character, or the degree of the imputation conveyed; but on its nature and character, relatively to the occasion and subject-matter of discussion, and as compared with the materials out of which it was professedly deduced. It is obvious, therefore, that it is impossible to predicate *à priori* what imputations may or may not be privileged. Any imputation may be, or may not be, under the circumstances.

The question would be in these cases, as in the present, whether there were any public incidents or circumstances around the act, which would so far qualify it as to make the motive fair subject of public discussion. That would depend entirely on the circumstances of each case; and, probably, the Lord Chief Justice did not mean to lay it down broadly, that in no case could the motives of a public man be fit subject of discussion; but only that they could not be impeached where they were not so. Now, that is clear law as to every subject of imputation, whether acts or motives. In the present case, there was a question how far the plaintiff, in his character of editor, and also projector of this scheme, was a public man, so as to

make his public acts, as such, fair subjects of public discussion ; and how far the public incidents of his acts, or the character of his proposals, as declared by himself, were fair subject of discussion, in so large a sense as to include the suggestion of an obvious motive, which would depend on these proposals themselves, and the letters, &c.

If we are right in our view of the scope of the Doctor's publications, then no doubt the Lord Chief Justice was wrong in telling the jury, that the probable authorship of the letters, and the probable object of the Doctor in issuing his proposals, were not fair subjects of comment. And in that view, probably he himself would not have disputed that they were fair ; or, at all events, not so unfair as to be malicious, and deprived of the protection afforded by the privilege of free discussion. At all events, he did not appear to think that there was any evidence of such excess as to be express malice, assuming the imputations relevant, and arising out of the subject of comment. Nor did he say or imply, that if they were relevant, and did arise out of the subject of comment, they would not be protected, in the absence of such excess, and of any other evidence of malice.

The Lord Chief Justice laid it down, it will be seen, that there was no lawful occasion to discuss the Doctor's motives, or the genuineness of the letters ; for that neither the one nor the other arose out of the Doctor's publications, and so neither of them were fair subject of comment. And, if the Lord Chief Justice were right in his views of the Doctor's publications, he was certainly correct. But then he could not be right in that view, as it seems to us, because the Doctor's motive and extreme anxiety about the heathen were made the basis of the scheme ; and because there were very many circumstances on the face of his publications which did, in our opinion, raise the question of the probability of the letters not being genuine. It is, however, entirely a question of construction of those publications. Nor are we sure that the Lord Chief Justice laid down, or implied any proposition of

law not perfectly correct ; nor that he applied the law wrongly, except upon the assumption that he was wrong in his view of the scope of the plaintiff's publications, or confounded fair subject of comment with fair comment.

The Lord Chief Justice did not lay it down that, if these matters were fit and fair subjects of discussion, there was no privilege in the discussion of them ; and that the defendant would be liable, even although he wrote honestly, and under an honest belief. But he laid it down that there was no fair occasion for discussing these matters at all, out of which the imputations arose ; and that the imputations did not arise out of the matters which there was a fair occasion to discuss. And he did not lay it down that honest belief was always immaterial ; but that it was not material when there was no lawful occasion to discuss the matters out of which the imputation arose ; or when the imputations did not arise out of the particular matters which there was occasion to discuss. And again, on the same ground, the Lord Chief Justice did not leave the fairness of the comments to the jury.

So, when the case came into *banco*, unfortunately the Court appeared to understand that they were asked to affirm that the mere fact that there was a fit occasion for public discussion of a subject to which the imputations might not be utterly irrelevant—coupled with honest belief in the truth of the imputation—conferred a privilege or protection. And, of course, on that view of the defence they negated it, not only decidedly, but with some degree of natural impatience ; and then, as often happens, uttered some expressions which looked like a broad denial of any privilege in public writers on public questions. These *data* are obviously either to be deemed *obiter*, or they are to be referred to and restrained by the question to be determined—which was, the existence of privilege or protection in a case of imputation upon subjects deemed not to have been fair subjects of discussion or imputation at all. Unless so construed and restrained, these *data* were clearly contrary to the authorities.

For the reasons we have given, we conceive that they did; that the case was one of privilege, on the ground that there was a right of free discussion, as to those particular matters. And we conceive, further, that the real question was honest belief—because everything else on which the question of the honest exercise of the right might depend was admitted, or not disputed. Personal motive was not imputed; nor was there any such violence of language as would, on the face of the article, show general malice. And the Lord Chief Justice himself told the jury, not only that the occasion was one for severe observation, but that the particular observations made were such as might very naturally have been made; and were no doubt made with no other motive or intention than to denounce the scheme which he himself described as fit subject for severe observation.

Assuming that the plaintiff's publications made the subject of the imputations complained of part of the subject of discussion, then the Lord Chief Justice expressly said that the writer had honestly exercised the right of free discussion:—

“It is impossible to conceive any subject on which comment and criticism might more fairly be made, and any writer who thought that this proposal of the plaintiff could only end in disappointment to the public who might be induced to subscribe to his paper, and that they would be throwing away their money, would have a perfect right to comment upon it, with some latitude of criticism and comment. And it is to be regretted that the means proposed by the plaintiff to carry out his ends should have been of a somewhat doubtful character. It certainly does at first sight seem to be so when a man says, ‘Here is a great work—a work in which all Christians should unite.’ And how is it to be accomplished? ‘Subscribe to my newspaper.’ It does sound odd, and provokes the suggestion that it is not so much the interests of religion which the man has in his mind as the promotion of the circulation of his own paper. And when a person not imbued with his religious views comments upon the case it might easily suggest itself to his mind in that point of view. You may

think that there was no ground for it, but still, if it might naturally suggest itself to the mind, you must make some allowance for the position of the writer, who may have been influenced by a sense of public duty; for I cannot help saying that I think it is going too far to state that the object of the article was to injure and crush the plaintiff. There was a strong spirit of antagonism naturally aroused by these very conflicting views on a matter connected with religious opinions, and the writer in the *Review*, no doubt, sat down to attack the plaintiff, not as the individual, but as the journalist, and as an upholder of particular views. And if he has, in doing what he might conceive to be his duty, unjustly aspersed the plaintiff, we must still look at the matter as one arising out of a public controversy, and not as one in which there was any intention to wound and injure the plaintiff."

It would be impossible more fully or more explicitly to admit that, assuming the subjects of imputation to be fair subjects of discussion at all, the right of discussion was honestly exercised for the purpose of honest discussion. Then, what was wanted, in that assumption, to constitute a legal excuse? Nothing but honest belief, if that was not indeed implied; that is to say, waiving the question as to what was fit subject for public discussion, (it being laid down, however, that there was some ground for hostile observation and severe censure,) there was no intention to injure the plaintiff, nor any other intention than to exercise that right of public discussion and hostile observation upon obnoxious publications and proposals of the plaintiff; that is to say, there was an honest exercise of the right, which, according to the authorities, was a right the honest exercise of which carried with it a privilege and a protection in the absence of any evidence of malice. But according to the above observations of the Lord Chief Justice, there was no evidence of malice, and there was an honest exercise of the right. What more could be required to confer protection? Nothing more,

beyond all doubt, than the honest belief in the truth of what was written.

That question was left to the jury separately, with a direction that it was not material; and they found it in favour of the defendant. Of course, if the occasion was one of privilege, that would amount to a verdict for the defendant. Nor would it be necessary even to leave it to the jury in his favour, or as part of his case. The occasion being privileged, the absence of malice is presumed in the absence of evidence to the contrary. That evidence it was for the plaintiff to find or suggest, and to ask to have left to the jury. The presumption of malice was already negatived. It was for the plaintiff to restore it. The finding of *mala fides* would have replaced it; but the finding of honest belief was not necessary to remove it. It was already displaced. There was no evidence of wilful falsehood. The question of honest belief was not necessary for the defence, as it had been admitted that the defendant wrote honestly. The jury were told so. It was superfluous then of the counsel for the defence to ask to have honest belief left to the jury at all; nor would he have asked it had he known that the judge would tell the jury that the writer wrote honestly and for an honest purpose. The Lord Chief Justice evidently quite misunderstood the view with which the question was suggested. He thought, and so did the Court *in banco*, that the defence was put entirely upon honest belief; that is, that there was a privilege or protection merely by reason of honest belief. Not at all. The question was proposed thus:—that as the occasion was privileged, the publication would be so at all events, if there was an honest belief, because there was an honest exercise of the right. The latter being admitted, the former was virtually involved in it. And the admission that the writer had written honestly carried with it entire immunity, unless there is no protection to a public writer on a fit subject of public discussion.

The Court did not say that there is not such a privilege in

the discussion of public matters out of which the particular imputations might naturally arise, but only that there is not such a privilege in the discussion of matters out of which the particular imputations do not naturally arise, or in the discussion of matters not public, and which there is no right to discuss. If any observations were made which might appear to imply that there must be materials whence the writer might fairly infer the imputation, such observations must either be deemed *obiter*, and going beyond the occasion, or must be limited and explained with reference to the point on which the defence was supposed to have been rested, that honest belief is, *per se*, sufficient; which, of course, led the Court to comment on the insufficiency of honest belief, without, at least, reasonable grounds for the imputation. But they were speaking of a case in which—apart from that—they deemed there was no privilege, because there was no lawful occasion to discuss the matter out of which the particular imputations arose. They cannot be taken to have laid it down, that, assuming such a lawful occasion to discuss matters out of which the particular imputations might naturally arise, it would be necessary that they or the jury should consider that there was fair ground for the imputations. As to the jury, there cannot positively be any questions for them but whether libel or no libel, or malice or no malice. As to the Court or the judge, the only questions that can arise are, whether there is a lawful occasion to discuss the particular matter out of which the imputations may naturally arise; not whether the imputations are fair. That is no question, then, either for judge or jury; the only question that can arise, even for the jury, is, whether they are so unfair as to be malicious.

We regret that some of these remarks should have been made, because they may have produced an impression that the great right of free discussion, one of the most valuable possessed by Englishmen, has not the protection or privilege which is given by the law in all cases of even private right;



viz., the privilege of immunity from legal liability for casual defamatory observations in the course of its honest exercise. We hope, however, that we have shown that these remarks are either to be deemed *obiter*, or are to be considered as applied only to cases in which the imputations are beyond the limits of discussion, because the particular matters are not within the scope of the subject-matter of discussion, and so not within the lawful occasion of discussion. The case the Court were called upon to consider was one in which the judge at the trial had been left under the impression that any imputations were protected, if relevant to the general subject of discussion, provided they were honestly believed to be true, and even *in banco* the Court were left under the same impression, and it was to that they pointed their observations.

It was said, more than once, that public writers are mere "volunteers;" but, in the words of a great judge, "there are many cases in which volunteers have been held to be privileged when acting *bonâ fide*."\* And it must be taken that the Court here meant that public writers are volunteers, only when they make imputations on subjects which are not fair subjects of comment. The very notion that an occasion has arisen for public discussion of a matter, is surely a notion that the matter is of public interest, and that the discussion of it will be for the public benefit. It is an abuse of terms to sneer at a public writer under such circumstances as a "volunteer." In no sense in which the term is ever used in law is he justly so to be called. He is not a mere wanton, idle intruder into the subject.

The law tells him that it will be for the public interest that he should write upon it, and he writes in the exercise of what the law deems a valuable public right. So highly does the law value it that, on any view, it allows some degree of protection or immunity to its exercise; and it is, we repeat, an abuse of language to call those who exercise a legal right

\* Maule, J., 10 C. B. 583.

which they are by the law encouraged to exercise, "volunteers." And most illogical is it upon this abuse of language to found an argument; and from a false statement of the case to deduce an inference fatal to the immunity. The law declares there is a fitting occasion for public discussion, because it deems that discussion is for the public benefit. How monstrous for judges to declare that the man who exercises this right is "a volunteer," and thence to infer that he has no privilege!

Even if the assumption were as fair as it is the reverse, the inference would be ill-founded in law, for, as we have shown, volunteers often have privileges. But to make a gratuitous assumption, and then to found on it an utterly fallacious inference in order to show that a man has no privilege in the exercise of a public right which the law encourages him to exercise, is surely a most unsatisfactory mode of argument.

Surely the fair and proper inference from the acknowledged existence of what the law deems a valuable public right is, that its honest exercise is protected. The inference is so natural and simple that it commends itself to common sense and scarcely requires authority. But all legal analogy is in its favour. There is no instance of a public legal right recognised by law on the ground of public interest, the honest exercise of which is not protected. The instances of a criminal prosecution, or a civil suit, are familiar illustrations. All privilege is based on public interest. Some are personal and partake of the nature of *privilegium*, such are the privileges attaching to the office of the judge, or of the advocate, or the character of the witness. The advocate has freedom of speech because his office is deemed for the advantage of the administration of justice, and, therefore, for the public benefit. The public writer is told that he may discuss a subject because its discussion is for the public interest. To tell him that he may do so if he writes nothing that can be deemed, legally defamatory, is to tell him nothing, or to tell him nonsense. A man

knows that he may write anything of anybody if it is not defamatory. To tell him again that he may write anything a jury may happen to deem "fair," is to delude him with the pretence of a protection which will fail him in his hour of greatest need, and in his hour of greatest merit. Never does a public writer less require protection and less deserve it, than when he panders to popular feelings, and so is certain of the sympathy of a jury. Never does he more require it, and more deserve it, than when he is running counter to popular feeling, and is certain not to have the sympathy of the jury. And in such a case to tell him to go to a hostile jury to say that his observations are fair, is merely to insult him with a mockery of justice. There is nothing which is more difficult, even to the most enlightened and impartial mind, than to say what is "fair" in observations which are obnoxious, and opinions which are disliked, and expressions which displease, the persons who are to judge. And to invite a public writer who has exposed some popular impostor, or some public pretender, to go before a jury and ask them to say that his reasons and his strictures are "fair," is really an idle mockery; but the law imposes no such idle task upon him; it puts him in no such peril. It tells the jury on their oath to acquit him unless they are satisfied that he wrote maliciously. And if there is no evidence of malice the Court will not allow a verdict against him. Malice or no malice is a distinct intelligible issue, beyond the vague region of mere arbitrary opinion, which can never be reviewed; and within the definite province of legal evidence and judicial judgment.

There, then, is a real protection, an effective privilege; anything short of that is a mere pretence, a "mockery, a delusion, and a snare." It is to lay snares for public writers to invite them to write, and write severely, and in terms of indignant censure, and at the same time lie in wait to fall upon them if they transgress the letter of the law of libel. It is to put traps, and dig pitfalls, and then bid them walk boldly and

fearlessly along the way : or, if the pitfalls are open to view, then it is to destroy all fearless writing, and make them creep and crawl about feeling their way most pitifully, afraid to denounce a delusion or expose a sham.

Since writing the foregoing remarks, the case of the Earl of Cardigan, which came before the same Court, has afforded an illustration, and, in some degree, confirmation of what we have submitted. In that case there was ground for a statement that the Earl had, as a matter of fact, ridden back alone from the battery, before the rest of his brigade had charged, but there was none for an imputation of cowardice, which the Court deemed to be conveyed. There was nothing, in their opinion, to give a colour or pretence for that imputation, and so there was no protection on the score of free discussion. But the different members of the Court said not a word against the existence of such a protection within the legal limits of the right ; even in the case of erroneous and injurious imputation, if honestly made in the exercise of the right. On the contrary, they again and again, in the course of the argument, drew attention to the distinction between an erroneous inference, and an imputation wholly unfounded. And in the course of his eloquent judgment, the Lord Chief Justice thus clearly and explicitly laid down the law upon the subject, evidently after some reconsideration, and with a view to avoid any inferences hostile to the due protection of public writers, or unfavourable to the free exercise of the right of public discussion :

“ But then it is said that, whether the imputation was true or not, this was a case in which the defendant, as a public writer, and an historian of the events of the campaign, had a right to make such comments as he pleased upon the conduct of the Earl of Cardigan, who had borne so conspicuous a part in the events of that campaign. But this doctrine must be taken with certain limitations. It is true, indeed, that the events in question were of the deepest possible importance. It is true that the conduct of all who were engaged in them is fair and legitimate subject of public observation ;

and, whether the observations are contained in the periodical publications of the day or in a work intended to be a record of the events to which it relates, the rule is the same—that the public conduct of public men is always properly the subject-matter of fair public discussion ; but with this qualification, that the discussion must be kept within fair and legitimate limits ; and, according to the rule this Court laid down recently (in the case of *Campbell v. Spottiswoode*), it is not enough that a man who may be actuated by any of those motives which so often actuate us and produce an unconscious bias in the mind (even without our being aware of its influence)—personal dislike, political animosity, professional rivalry—all those causes which unhappily, in the infirmity of human nature, tend to create prejudice and ill impressions, too often without real foundation—it is not enough that a man influenced by motives of this nature but of which he may perhaps himself be unconscious, takes an unfair, uncharitable, and unjustifiable view of the conduct of the public man whom he sits down to criticise—it is not enough that he has persuaded himself of the truth of the view which he thus takes ; he must take care that, if he sits in judgment upon the conduct, or the character, or the honour of others, he does so in a fair spirit, and a reasonable manner, and he must be prepared to satisfy a jury, not, indeed, always that he has written what is actually true, but that he had at least fair and reasonable grounds for the censures he has cast upon the conduct of others. Here, therefore, it is not merely because Colonel Calthorpe had taken upon himself as a public writer to describe the events of the Crimean campaign that, therefore, he is entitled to deal recklessly with the character of others who may have been mixed up in the events he narrates ; and the question whether these were fair comments or not is not for this Court to determine, but for a jury. The question for a jury would be—not merely whether the writer was sincere in his belief, but whether the circumstances were such as that the comments were fair and legitimate.”

Now here it is plainly implied that, within the legal limits of the right of free discussion—that is, on subjects which are the fair subjects of discussion, erroneous though injurious misstatement, if honestly in the exercise of that right, and fairly

arising out of the particular matters which are fair subjects of discussion, are protected from legal liabilities. And though there is a little confusion as to the relative province of the jury and of the judge, we think when the Lord Chief Justice spoke of leaving it to the jury whether the comments were fair, he merely meant upon the question whether the defendant wrote in the honest exercise of his rights (which would be essential to his protection), and that when he said "fair," he meant not that they were to say whether the comments were in their opinion fair, but whether they were in their opinion so unfair as to be reckless and malicious. This is implied in the expression "fair spirit," and as in another observation made by the Lord Chief Justice, that if the observations were such as were so unreasonable and outrageous that no one could honestly have made them upon the materials before the writer they could not be protected.

Some of those observations, in *Campbell v. Spottiswoode*, certainly seemed to imply that a public writer is to be held strictly in the exercise of his right of fair discussion to that which a jury may consider to be fair. We have given our reasons why we consider this a position not warranted by law, and one which would be fatal to freedom of discussion in the class of cases where it is of most importance, and in which public writers most require, and most deserve protection—that is, cases in which they are in opposition to popular prejudices and predilections. We may urge, further, that such a theory leaves it wholly uncertain in what sense the word "fair" is used, whether with reference to actual truth, as proved at the trial (with or without a justification), or to the truth as it might fairly appear to the writer on the materials before him, or merely with reference to the opinion of the jury. In the first view, "fair" would be the same as true, and deprive a public writer of all protection short of a justification. In the second view, it comes very near in substance to what we have been urging, only putting it more confusedly, and huddling up the province of the jury and of the judge, and confounding the

question of what is fair subject of comment, with the question what is fair comment.

But it falls short of the law, as we conceive, in this, that it refers to the jury something else than that which we contend is in such cases the sole question for them, viz., did the defendant honestly exercise his right, without malice? As to the third way of putting it, viz., referring it absolutely to the jury, we have altogether failed in our argument if we have not satisfied our readers that it is utterly contrary to law, and puts public opinion absolutely at the mercy of the jury. We think we have done some service to the profession in drawing attention to this matter, if the view we have taken is, as we hope we may consider it to be, the correct one, in order to prevent misapprehensions which might have prevailed as to the real effect of the decision. If we are wrong, however, in this, and the Court meant to determine that in no case is there privilege to a public writer, but that he is to be held strictly to what a jury may deem "fair," then, indeed, this decision is the heaviest blow ever yet given to freedom of discussion, and a retrogression of more than half a century in the liberty of the press. It can scarcely be so, however, as we would fain hope, because the question of fairness of comment was not left to the jury at all (as it ought to have been, had such been, the law), and the Court did not say that it ought to have been, but said that the matters of the imputation were not fair subjects of comment. If there was an error in that, it was an error not in the law, but in its application to the particular case, and we trust, therefore, that nothing can be deemed to have been decided in that case at variance with what we have ventured to lay down as the general law upon the subject.

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**PART VII.**—*The Parliamentary Regulation of Labour in the Fourteenth and Fifteenth Centuries.*

2

Hence over a mile, within a gret village,  
Both man and woman, child, and hyne, and page."

The plague of the years 1348 and 1349, called the Great Death, is said to have destroyed nearly two-thirds of the population. A mightier power than King Edward encountered him in the midst of his career, and forced him to utter the penitential words impressed upon some of his gold coins—

**Domine ! Ne in furore tuo arguas me !**

At this time numbers of men were drawn off by the war, while the growing manufactures attracted increasing numbers, and the pestilence was naturally followed by a lack and dearth of agricultural labour. The lack could hardly be supplied by human means, but the dearth was supposed to be within the compass of an Act of Parliament, and therefore after the following preamble:—

“Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many, seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness than by labour to get their living, . . . considering the grievous incommodities which of the lack, especially of ploughmen and such labourers, may hereafter come, . . .”



It was ordained—

“That every man or woman in the realm of England, of whatsoever condition, whether freeborn or servile, if able-bodied and under the age of sixty years, not living by merchandise, nor having any certain craft, nor means of his own to live upon, nor land of his own, in the cultivation of which he may be employed, and not retained in any one’s service, if required to labour in any service suitable to his condition, shall be bound to serve the person who chooses to engage him, for the wages, liveries, rewards, or salaries, accustomed to be offered in the districts in which he ought to serve, in the twentieth year of the King’s reign—the year 1346—or in the five or six ordinary years immediately preceding.”\*

The breach of this ordinance was visited by heavy penalties, both upon the employers and the employed. No man might give alms to any person able to serve, under pain of imprisonment.

At the end of two years there were complaints that the new statute of labourers had not been observed:—

“Forasmuch as it is given the King to understand . . . that the said servants, having no regard to the said ordinance, but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year.” . . .

And it seemed good that the wages of labourers and artificers should be definitely fixed.

Another Act of this year, 1351, shook one of the bulwarks of freedom: it allowed a lord to seize his villein and allege villenage, in an action brought against him by the villien, although there might be a writ *de Libertate Probanda* depending. The law could no longer justly boast of its patronage of liberty.†

The statutes concerning labourers were re-enacted or confirmed in the thirty-fourth and forty-second years of Edward the Third, and again in the second year of Richard the

\* 23 Ed. 3.

† F. N. B. 177. Co. Litt. 124 b.

Second. By the Act of 1360, a fugitive labourer might be outlawed, and after capture, might be imprisoned, and branded with the letter F if the person aggrieved demanded it; but this punishment of burning was deferred until the succeeding Michaelmas, and then could only be done by the advice of the magistrates, and the consent of the sheriff who kept the branding iron. The landlords were not merely unwilling to pay good wages, they tried to get agricultural service without payment; their tenants were still nominally subject to tributary labour, but in the counties around London, this labour had become almost obsolete; it was considered irksome and degrading. The attempt to enforce it seems to have been the main cause of the great rising in 1382. The Kentish men had been stirred by the preaching of John Ball; there was a general prejudice against the thrifty Flemish weavers who had settled in England, and were supposed to be taking bread out of English mouths; and we should say that the poll-tax had more than an accidental connexion with the rebellion; the poll-tax must have been odious, not as a tax alone, and as a tax levied in an unpleasant, oppressive manner, but as a symbol of villenage. Were English freemen to be slaves, were they to be subject to head-money—the old charge upon bondmen, to tributary labour, to every badge and burden of servitude?

No sound can be more terrible than the voice of a mad-dened people. The disciples of John Ball came out with an uproar which had a powerful effect upon Chaucer, and Gower, and Walsingham, and all others who were conscious of it; they came out to conquer the realm with clubs, and rusty swords, and twibills; with bows ruddy by long hanging in smoky cottages, and a scanty provision of poorly trimmed arrows.\* King Richard bore himself well for once in his life, and Sir Robert Knollys—one of the ablest of the

\* Holinshed. Walsingham's Chronicle in Camden's Collection, 248, 251. Chaucer's Tale of the Nun's Priest. Froissart, lxxv.

leaders trained in the school of King Edward—was at hand;\* but an English government has seldom been in greater peril; and the end might have been otherwise if the peasants of Norfolk and Lincolnshire could have reached London before the men of Kent, and Essex, and Hertfordshire had been dispersed.

The peasant lived thenceforth under still stricter discipline. Although perhaps a freeman, he was almost attached to the soil. He could not step out of his hundred or wapentake without a licence under the King's seal;† complaint had been made that servants and labourers were wont to fly from county to county, because the ordinances were not uniformly executed; these migrations were usually made under the colour of a pilgrimage. A man brought up to the craft of husbandry until the age of twelve years was not allowed to adopt another trade. By statutes of Henry the Fourth, it was ordained that a man spending less than twenty shillings a year, should not make a handicraftsman of his son, and that no labourer should be retained by the week. Until 1416, the employer had been punished for a breach of the statute of labourers; in that year the penalty was confined to the labourer, but such penalties ultimately fall upon the employer, or upon the general public. The rate of wages was repeatedly settled in Parliament; we can notice only those Acts which were in force for any length of time. Wages were regulated in 1388—the twelfth year of Richard the Second, in 1444—the twenty-third year of Henry the Sixth; in 1515—the seventh year of Henry the Eighth. The statute of the last-named year enacts that no bailie of husbandry shall take for his wages by the year above 26s. 8d., and for his clothing,

\* Hob the Robber, who is threatened by John Ball, may mean Sir R. Knollys; he for a time commanded one of the predatory bands called "companies of adventure," in the fourteenth century, and "*Skinnners*"—Ecorcheurs—in the fifteenth.

† Such a seal has the legend *Sigillum Regis in comitatu de N*—encircling the name of the hundred or wapentake. Seals of the hundreds of Walshcroft (Lincoln), Staploe (Cambridge), South Erpingham (Norfolk), and Wangford (Suffolk), may be seen in the British Museum.

5*s.*, with meat and drink; no chief hind, as a carter, or chief shepherd, above 20*s.* by the year, and for his clothing, 5*s.*, with meat and drink; no common servant of husbandry above 16*s.* 8*d.* by the year, and for his clothing, 4*s.*, with meat and drink; no woman servant, above 10*s.*, and for clothing, 4*s.*, with meat and drink; no child within the age of fourteen years, above 6*s.* 8*d.* by the year, and for clothing, 4*s.*, with meat and drink. The wages of each class, excepting the woman's wages, were slightly raised above the rates of 1444. Under the Act of 1388, the yearly wages of a bailiff were 13*s.* 4*d.*; of a chief hind or shepherd, 10*s.*; of an ordinary labourer, 7*s.*; of a woman, 6*s.* The Statute of 1515 proceeds to determine the wages of other workmen and artificers, and then ordains—that in the time of harvest every mower shall take by the day 4*d.*, with meat and drink, and without meat and drink, 6*d.*; a reaper and a carter, every of them, 3*d.* by the day, with meat and drink, and without meat and drink, 5*d.*; a woman labourer and other labourers, every of them, 2½*d.* by the day, with meat and drink, without it, 4½*d.*\* Any servant in husbandry refusing to work according to this ordinance to be committed. Any labourer taking higher wages than the legal rate to forfeit for every default, 20*s.*; and every artificer and labourer to be at work between the midst of the month of March and the midst of the month of September before five of the clock in the morning; to have but half an hour for his breakfast and an hour and a half at his dinner, at such time as he hath season to him appointed for to sleep. And at such time as he hath no season to him appointed for to sleep, then he shall have but an hour at his dinner, and half an hour for his noon-meat, and he shall not depart from his work during that season till between seven and eight of the clock in the evening.†

\* Compare the rates of 1351 . . . no labourer for making of hay shall take but a penny on the day, and the mower 5*d.* for the acre, or 5*d.* for the journey, without meat or drink: no labourer reaper in the first week of August shall take but 2*d.* a day—the second day 3*d.* . . . No man shall take for threshing of a quarter of wheat or rye, but 2*d.* ob., and for a quarter of barley or oats 1*d.* ob.

† We may doubt whether these rules were ever strictly observed. The

. . . . And from the midst of September to the midst of March every artificer and labourer must be at work in the spring of the day, and shall not depart afore night. And the said artificers might not sleep by day but only from the midst of the month of May unto the midst of the month of August. The same hours of labour are ordered by a statute of Queen Elizabeth passed in 1562; but the Legislature, convinced at length that no uniform standard could be maintained, directed that the wages of servants, labourers, and artificers should be assessed by the sheriffs and other magistrates.\*

While our Parliaments were thus dealing with labour, they passed a concurrent series of Acts concerning badges, liveries, and apparel.† These Acts were in some measure provoked by attempts to evade the former class of enactments. Landlords could not always hire servants in husbandry at the rates fixed by Parliament, and they could not give better wages with impunity. Hence the expedient was adopted of giving livery coats to ploughmen and carters to enhance their wages. This crafty device was encountered by Acts of Edward IV., ordaining that labourers should not wear hose costing more than thirteen pence a pair; that labourers and the wives of labourers should wear no cloth worth more than two shillings a yard; should have no silver lace upon their belts or girdles.‡ People have been innocent enough to believe that

people of Derbyshire did not adhere to them in the middle of the seventeenth century.

"For diet, the gentrie, after the southern mode, have two state meales a day, with a bit in the buttry to a morning draught; but your peasants exceed the Greeks, who had four meales a day, for the moorlanders add three more; y<sup>e</sup> bit in the morning, y<sup>e</sup> anders meate, and the yenders meate, and so make up seaven; and for certaine, y<sup>e</sup> great housekeeper doth allow his people, especially in summer tyme, so many commessations."—*Philip Kinder*—(Lyson's Derbyshire, Introduction.)

\* 5 Eliz. c. 4. The rates of Servants' Wages within the City of Chester, limited at the general Sessions, anno 12 Eliz. (1570,) (Harl. 2054,) anno 38 Eliz. (1596). (Hal. 2091, f. 212 b.)

† 37 Ed. III. c. 8, 14. 16 Ric. II. c. 4. 1 Hen. IV. c. 7. 2 Hen. IV. c. 21.

‡ Juratores dicunt quia S.M. nunc serviens W.L. cepit apud K ad serviend' ejusdem W.L. in servitio Husbandrie apud K. a festo Sancti Michaelis archangeli anno iiii domini regis nunc, per unum annum tunc proximo sequentem, pro xxx<sup>s</sup> in pecunia numerata, unam rogam, unum

when ploughmen figured in silver lace they really paid for all their bravery; that ploughmen lived under Edward IV. in ease and comfort and absolute luxury.

These Acts of Edward\* had, of course, a further object. They were designed to check extravagance, for people in those days were really very fond of gay clothing. Monstrelet's Friar Thomas Conecte is a witness that the taste was not confined to England.† In England it extended to persons in low ranks of life, even to priests and friars. The laws were likewise aimed at the custom of maintenance; by giving badges and liveries, noblemen attached to themselves a crowd of followers and partisans, to the great detriment of peace and justice.‡ It became the main business of a justice of the peace to enforce the laws relating to labourers, vagabonds, retainers, badges, liveries, and apparel.§

The landlords still tried to get ploughing and reaping done for them by the tenants, and the tenants being more willing to pay than to work, the landlords improved their rents by increasing the fines which were due for services unperformed; thus raising the conversion price of labour,|| while they tried to

capicium, unum par callegarum, unum par sotularium ad valentiam vii, necnon cultur' octo acr' terre, precii x\*, contra formam statuti in hujusmodi casu edit' et provisi etc.—(Totyl's Tracts, 66.)

Quia cum in statuto domini regis H. 4 nuper regis Anglie anno regni sui vii etc ac in statuto in parlamento domini Henrici sexti bone memorie anno regni sui octavo . . . inter cetera contineant, quod non liceat alicui cuiuscunque status gradus seu condicionis fuerit, dare aliquam liberatam vesturam, vel capis' alicui persone nisi tantum modo familiaribus, officariis, ballivis et servientibus suis, et aliis hominibus de consilio suo in una lege seu altera eruditus . . . quidam tamen R. B. de C. in com, Huntingdon armiger statuta predicta minime ponderans, quandam liberatam vestur' videlicet diversas togas coloris *frost meadow* quibusdam J. de B. yoman etc et R. C. de eodem yoman, qui non sunt neque unquam fuerunt servientes . . . ipsius R. B. . . dedit et distribuit. (74 b.)

\* 3 Ed. IV. c. 5. 22 Ed. IV. c. 1.

† 2 Johnes' Monstrelet, 490.

‡ "It is the guise of your countrymen to spend all the goods they have on men and livery gowns." A saying of Chief Justice Billing, recorded in the Paston Letters.

§ Totyl's Tracts, 30 b.

|| . . . in ancient times, almost all rents were paid in kind, in a certain quantity of corn, cattle, poultry, &c. It sometimes happened, however, that the landlord would stipulate that he should be at liberty to demand of the tenant, either the annual payment in kind or a certain sum of money instead of it. The price at which the payment in kind was in this manner ex-

beat down its market price. The tenants might well ponder over this, and might well ask their rulers to explain the sense and the justice of it. In the year 1438 the tenants of Rickinghall, which lies between Norwich and Bury, presented a petition to their landlord, the Abbot of Bury, showing that in former times they had been accustomed to render divers quarters of oats, and to do diverse operations in winter, summer, and autumn, as well as acts of portorage on foot or on horseback ; all which things, as appeared by a certain old register of the Lord Abbot, had been converted into money ; that is to say, it had been arranged that the tenants should give for every quarter of oats two shillings, and for three works in summer and winter one penny, and for every autumnal work without reserve one penny halfpenny, and for every summage or horse load, one penny, and for each act of common portorage, or footaver, one halfpenny. And whereas certain land-agents of Rickinghall, of their own authority had altered these accustomed rates, and had for some time past directed that two shillings and eight pence should be paid for every quarter of oats, one penny for every work in summer and winter, fourpence for every work in autumn, twopence for summage, and a penny for portorage, it was the object of the petition to induce the Lord Abbot to concede that thenceforth two shillings and twopence might be paid for the quarter of oats, a halfpenny for each work in summer and winter, threepence for each autumnal work, a penny-halfpenny for summage, and a penny for portorage ; and to release the tenants from the obligation of undertaking the offices of reeve and hayward, which they found very burdensome, and desired to be quit of altogether : in return for these concessions the tenants were willing to pay an additional rent of one farthing upon the acre. *Abbas suum temperavit responsum*—The Abbot made a considerate answer, declared himself personally well-

changed for a certain sum of money, is in Scotland called the conversion price. (Adam Smith.)

inclined to meet the wishes of the tenants; but it does not appear that their memorial received any further attention.†

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ART. III.—ON THE TRIAL OF ISSUES INVOLVING THE CONSIDERATION OF SCIENTIFIC EVIDENCE AND THE EVIDENCE OF EXPERTS.†

ALTHOUGH this subject so recently occupied our attention, I cannot help feeling that neither the Society nor any individual members of it can require from me an apology for the continued discussion of so important a question as that which relates to the true position of science and skill in the administration of justice. Much less can I allow myself to believe that the Society could deprecate the use of its time in endeavouring to discover how the different departments of human knowledge may be made subservient to the practical efficiency among the people of the principles of our system of jurisprudence.

And, in truth, this serious question, notwithstanding all the debate and controversy we have had about it, has not yet received its solution. Nor, when we attentively consider the objections that have been made to proposed changes in the existing procedure, can we wonder at the hesitation, so plainly manifested by our profession, to interfere with the present mode of trial which does not exempt skilled knowledge from the ordinary conditions of sworn testimony.

\* Add. 14850, f. 143 b.—

	Ancient Rates.		Modern Rates.		Proposed Rates.
Quarter of oats . . .	ii <sup>s</sup> .		ii <sup>s</sup> .	viii <sup>d</sup> .	ii <sup>s</sup> . ii <sup>d</sup> .
Each general work . .	½ of a penny . .		id.		ob.
Each autumnal work .	i <sup>d</sup> . ob. . . . .		iiiid.		iii <sup>d</sup> .
Summage . . . .	id.		ii <sup>d</sup> .		i <sup>d</sup> . ob.
Porterage . . . .	ob.		id.		id.

† A Paper by Robert Stuart, Esq., read at a general meeting of the Society for the Amendment of the Law, held on Monday, the 22nd of June, 1863



It is, indeed, well that it should be so, and that a right and discriminating conclusion should not be arrived at, on so large and difficult a subject, without reiterated and anxious consideration, and without hastily setting aside a practice, like the present, which, whatever its intrinsic defects, has contrived not only to maintain itself without disrepute, but to have attracted to its support a great and learned experience. Its very detractors (if I may be allowed to use an expression that may appear harsh to the minds of some) have been its disciples; and our learned and able colleague, Mr. Webster, will, I feel assured, not refuse to admit the claims of a procedure in the service of which he has himself accumulated that learning and forensic ability which have made him one of our chief authorities in this delicate branch of legal administration.

But undoubtedly an amendment of the law is here required. What form that amendment may assume, and what may be the weak spot it may discover, I fear we are scarcely yet able to show. Is it that our present mode of trial overlays too much the witness's scientific mind, or the generic quality of the expert's skill, and that *nisi prius* does not treat these aids to its justice with becoming respect? Or is it that juries take too low a measure of the claims of science, regarding them simply as helps and contributors of those particulars which are inductively to lead to their verdict? Or is it that the breast of the judge requires to be scientifically instructed and expanded, and that the mind and conscience of the Court itself are judicially wanting in this one great element of its constitution? Or is it that the scientific man should not be a witness at all, but a juror, or it may be a judge? These and such like are among the considerations which must be taken into account. Clear it is that this matter of science, if it be, indeed, a reproach and embarrassment to the Courts, is not too large or difficult for the law; nor was the Roman lawyer mistaken when, with lofty ideas of his calling, he defined jurisprudence to be "*divinarum atque humanarum rerum notitia, iusti atque injusti scientia.*"

Perhaps the most useful manner in which, at this period of the controversy, I can re-open the subject is, by briefly reviewing the discussion that has already taken place, and of which we have reliable reports in duly accredited publications. But I beg to be allowed a few preliminary remarks.

When this subject was last before the Society, it appeared to me that it had not been sufficiently considered, more especially with reference to its strictly legal bearings. So far as I could understand, a great deal was said about science, and scientific evidence, and scientific assessors, and a number of speculations were offered, having, as it appeared to me, a mere regard to these particulars. But I could not see how, what was said on these subjects was intended to qualify the one great question, viz., the proper form and order of the trial. I say the *trial*, for, with great deference, what we have chiefly to consider is not a mere matter of science or of scientific evidence; it is a question as to how we are to deal, not only with science strictly so called, but with all kinds of peculiar knowledge and skill when we require their aid for the purpose of determining right and justice between litigants; in other words, it is a question as to how we are to make the knowledge and skill of persons in particular departments of life available in the administration of the law. Science and scientific men, no doubt, come largely and perhaps chiefly under this category, but there are others in the same situation. The evidence of skilled tradesmen, of foreign lawyers, of doctors and surgeons, and, in short, of all who, by profession or calling, or by the accumulation of particular knowledge and experience in any recognised business, have established for themselves a certain reputation, are as much experts as the strictest and the most gifted of scientific men, and entitled to as much consideration. In fact, skilled evidence, that is, the evidence of skilled opinion, whether taken as matter of fact, as in the case of foreign law, or of mere opinion, must, as it appears to me, be all taken in the same way; and what we want, therefore, is not so much to hedge round science and its

votaries with any protective device, but such a procedure at the trial as will best, most justly, and most completely, give effect to the evidence which the parties have adduced, whether that evidence be purely scientific or skilled testimony, or be mixed with other evidence relating to the facts in dispute. This was, I think, the real question for our consideration, and it is a question rather for the legal than for the scientific man.

But now to the former discussion referred to. As the Society is aware, that discussion arose in consequence of the conflicting medical evidence that was given at the trial of Dr. Smethurst for murder, in the autumn of 1859; and it was at first conducted with the greatest violence and acrimony, the newspapers of the day being inundated with letters all more or less distinguished by these ungenial qualities; "*Medicus*," "*Justitia*," *Lex*," "*Veritas*," "*Scientia*," and various other *nommes de plume*, being the signatures under which the vituperative missives were published. But it does not appear that the lawyers were much excited; they rather seem to have considered that the quarrel having been made by the doctors, these gentlemen had better settle it among themselves. And here I must observe, that, if the matter of *procedure*, on which the discussion is now brought to bear, had been left to be considered with reference to the trial in question, nothing could have been more unjust or more unreasonable than to have preferred any complaint on that score; for, whatever may have been thought of the verdict, the trial itself was, from beginning to end, and with reference to all the evidence, and all the witnesses, a perfectly fair one.

I have heard it said that medical men in general make bad witnesses, and that they generally contrast unfavourably in this respect with soldiers—a remark that may be quite intelligible without any necessary disparagement of our medical friends in the estimation at least of those who are acquainted with their professional idiosyncrasy—an idiosyncrasy which, however intellectual and philosophical, and medical, is just of the kind which, in the interest of the public, is, perhaps

all the better for that gentle and particular restraint which legal procedure now and then imposes upon it. The doctors were allowed, however, full play in the newspapers; and if they gradually got less excited, they became more serious and prolix, and the medical periodicals became very learned on the subject of medical and scientific evidence. Whether much light was thus thrown on what we lawyers call *evidence*, I do not suggest, but unquestionably a very great deal of cleverness and ingenuity was exhibited. Of course, there was no difficulty in removing the stage of the question from Smethurst's trial to the general platform of science at large; and one of the most conspicuous essays of the kind to which I alluded, was a paper read before various learned bodies, and in particular before the Society of Arts, on the 18th January, 1860, Vice-Chancellor Wood being in the chair, by Dr. R. Angus Smith, F.R.S., entitled, "Science in our Courts of Law." The paper was published in the number of the Journal of the Society of Arts for January, 1860, along with a report of the discussions that followed upon it, and it is a very long one. It is divided into numerous heads; and it would be idle for me to attempt to give anything like a *résumé*, however brief, of its actual contents. Nor is it necessary, for, while it suggests a number of important considerations, I cannot say, after a most careful perusal, that it assists us much in discussing the subject of my present remarks; while its more dogmatic statements could be easily proved to be erroneous, even if its peculiar style of composition was more favourable than it is to the communication of dogmatic truth. It is extremely metaphysical—and I had almost said eccentric.

The Society will pardon me if I give one or two illustrations of Dr. Smith's misconception of the subject. He observes:

"We see science moving with irresistible force, gradually seizing more and more of the rights and properties of every subject, and of every government, whilst the scientific man, the expounder of science, has no recognised place, but is allowed to give his evidence

as a necessity, and frequently in a manner that might be shown to be as illegal as it is for the time unavoidable."

What the Doctor means, in this very hazy sentence, about "evidence as a necessity," and yet "illegal," albeit "unavoidable," I cannot surmise; but we all know that medical and scientific evidence, which is always highly paid for, must be a necessity where it is judicially required; and that if it is not legal, it is not evidence at all. The Doctor proceeds to observe :

"That physical science is the ultimate referee in cases where it can give a clear answer, and that suitable arrangements should be made for obtaining the unprejudiced opinion of those who have studied it.

"That in all differences of opinion, whether in social or physical law, and in all difficult cases, the instincts of man, in a free country, will take the lead (right or wrong)."

The first of these points of course contains the abstract truth; but the obvious comment is that, as science is impersonal and cannot speak under the circumstances supposed, we must do our best in the witness-box with its human professors; and that in order to obtain that "clear answer," which it, that is science itself, if we could only subpoena it, could give, we must investigate, by examination and cross-examination, these professors' opinions. The Doctor himself seems to have had something of the same kind of misgiving in his mind, because he shortly afterwards admits that, "science is liable to be expounded by its teachers pedantically and imperfectly," and when he further on declares that "the public must expect a great deal of opposition among scientists." The second point I have quoted above is, I confess, to me not quite intelligible; for what he means by "the instinct of man in a free country taking the lead (right or wrong)," I do not see, unless, "by the instinct of man in a free country," we are to understand him to refer to the *jury*, "and by taking the lead (right or wrong)," to the *verdict*, whether it be correct, or one that "serves him right," which, of course, is generally wrong.

Again, Dr. Smith remarks :

"Even supposing a witness to insist, as some will do, on giving all his fullest evidence, it is scarcely possible to avoid having it distorted by the examining party. One trifling remark may be so examined, and so much questioning may be spent upon it, that it takes the place with the jury and the public of an important point. On the other hand, a most important remark is passed over in silence. Now this destroys the due proportions given to the evidence in the mind of the scientist."

The fallacy in this quotation is transparent. The importance of the witnesses' remarks is, of course, not to be viewed with reference to the matter of science in hand, but with reference to the issue in fact under trial, and to the true answer to which the scientific evidence is intended to lead ; and it is only evidence so far as it is introduced by the interrogatories in Court. As to the "due proportion given to the evidence in the mind of the scientist being destroyed," it really matters not whether it be so—the mind of the scientist has nothing to do with the question—it is the mind of justice, and of the law in relation to the question of right before the Court, which is the real consideration.

These and many other illustrations of the same kind, which I could give from this very singular paper, show that Dr. Smith misconceived the nature of evidence, and the legal position of a witness in a court of justice.

His general position appears to be this, that a scientific witness, or a scientific man, or a scientist, as he delights to call him, is not to be controlled by counsel at all ; in fact, is not to be examined by them, at least, in the first instance. He, as a scientific man, would ignore the Bar, and hold converse only with the judge, speaking what he likes and when he likes—a mode of proceeding, however, which I fear would make trials, involving the consideration of scientific evidence, very unedifying indeed.

The whole paper, although, as I have said, very clever, very

elaborate, and probably very subtle, is, in my humble judgment, a most unsatisfactory exposition, even if its peculiar and rather dreamy phraseology were of a more palpable character than it is. The best part of it is where, towards the end, Dr. Smith speaks of the remedy he proposes: the first point of which relates to the appointment of an assessor, and the second, to the mode in which a scientific witness ought to be examined; but the third is, I think, deserving of serious consideration. It is as follows:

“That scientific men giving evidence on scientific points shall be allowed to deliver their examinations in writing. The reading and elucidation to be controlled by the judge; examination and cross-examination by the barrister to follow.”

This proposal was thought so much of by the Rev. Vernon Harcourt (a gentleman who appears to have taken great interest in this subject), that he introduced it into a proposed Parliamentary Bill, which he drew up on the regulation of scientific evidence. He appears to have borrowed the idea from the examination of medical witnesses in Scotch criminal courts. But as I can attest from my own personal experience in these courts, that proceeding is not always attended with complete success. I have a very distinct recollection of being present at an Assize Court in Scotland, when one of the most distinguished surgeons of the present day was examined in the manner explained. He came, of course, with his report on the *Corpus delicti*. It was a very precise and distinct document; and, although he read it very badly, it made a great impression on the Court. Unfortunately, however, for the learned and distinguished professor (for he was a professor), the prisoner's counsel availed himself of the privilege of cross-examining him on his report; and I am really concerned to inform the Society that he succeeded too well in utterly destroying the weight of the professor's evidence, by the contradiction and general mess in which he involved him, and of which, in a spirit of great disrespect, he fully

availed himself in the very unreserved observations he afterwards addressed to the jury on the painful subject. I am very much afraid that if the distinguished professor, who is also a very learned and able author, had sat down, immediately after the forensic exhibition I have described, to write an essay on Medical Evidence, he would have written even more sternly and indignantly than Dr. Angus Smith has done. The incident I have related, however, shows the danger of allowing such examinations and cross-examinations without due regulation; and on this subject I shall, before I conclude this paper, make a suggestion as to the control under which *nisi prius* and Old Bailey advocacy should be placed in any amendment of procedure that may be adopted.

In the discussion which followed the reading of this paper by Dr. Smith, some very interesting and useful remarks appear to have been made by our learned colleague, Mr. Thos. Webster, Dr. Taylor, and others present. Dr. Taylor mentioned a circumstance of great importance, and which it is hoped may be kept in view in any reform which may take place hereafter. He stated:

“That the differences amongst scientific men were rather those of opinion than of fact; and from his own experience, which had been considerable, he knew that facts were often laid before them in such a manner that they had not a half even—if they had a quarter—of the truth of the case. It had occurred to himself upon many trials, both in cases of patent rights, and of murder, involving questions of the greatest importance to society, that, for the first time, he heard in the court facts which would have materially altered his opinion; so that scientific men were entirely at the mercy of those who instructed.”

The Chairman, Vice-Chancellor Wood, summed up the discussion, observing that the great difficulty in such evidence was the evidence of opinion, and, in illustration of this, he mentioned,

‘That, in a case which came before him, six of the most eminent



members of the Scottish Bar gave evidence upon a question of Scottish law—three on one side and three on the other. The question referred to a matter connected with the Free Kirk, and diametrically opposite opinions were given as to what the Scotch law was ; the opinion in each case coinciding with the particular religious views of the witness ; and yet in this case perfectly honest opinions had been given.”

Dr. Smith's paper had, previously to its having been read before the Society of Arts, been communicated to this Society, and I find that at our meeting of the 28th November, 1859, a committee was appointed to consider the subject, and on the 20th February, 1860, the committee's report was read. It will be found on page lx. of the *Law Amendment Journal*. This report in substance recommends that there should be no change in the existing procedure. The committee are against “any change in the existing mode of taking evidence, at least until some plan had been proposed of which the advantages would be clear, and which should work harmoniously with the rest of our legal system;” and they express their opinion that to none of the suggestions by scientific men that had been laid before them did this character apply. Some of these suggestions, they observe, were entirely nugatory, and others opposed to the whole spirit of our jurisprudence, or would introduce an element of confusion, of which it would be impossible to calculate the result. The report is also against requiring scientific evidence being given in writing, and also against scientific assessors; and the committee wind up by stating they see no reason for making any distinction between civil and criminal cases. As a whole, the report, which appears to have been the last serious expression of opinion by the Society, is distinguished by a candour and lawyerlike discrimination most creditable to its authors; and it is impossible to read it without a feeling of respect for the good sense and sound judgment which evidently guided its preparation; and, for myself, I must say that I very much sympathize with it.

The other medical and scientific gentlemen who have dis-

cussed this subject are Professor Christison, of Edinburgh, Dr. Letheby, and the reverend gentleman I have before referred to, the Rev. Vernon Harcourt.

Mr. Webster's paper, read here on the 18th of last month, again brought up the subject before us; and in a leading article of *Newton's London Journal of Arts and Sciences*, published on the 1st of this month, Mr. Webster's views are enforced.

I believe I correctly describe the discussion which has thus taken place by stating that, as it at present stands, it limits the consideration of any change to the proposal to appoint scientific assessors, and, in certain cases, to the modification of the trial by jury. But the controversy so stated, involves other elements of consideration, and I shall now submit to the Society the outlines of such a reform as, in my judgment, would meet any difficulty or inconvenience experienced under the existing system of taking this kind of evidence.

We must take care, however, to regard the subject from the true point of view. We shall not do so, if we look at it as a mere question of *evidence*, or even of evidence in relation to *science and skill*. The real and great question is, *how shall the issue be tried?*—for after the evidence has been given, and over and above it, there is the matter, the paramount matter, of *right and justice*, and how shall *that* be determined? The question, then, I say, is, *how shall the issue be tried?* Now this is a lawyer's question, and a lawyer's question exclusively; one to which Doctors of Medicine, and scientists as they are called, and experts in general, have nothing to say. After the discussion we have had, and under all the circumstances in which the question has been raised, it must be held to go to the very constitution of the existing tribunals themselves, and even to exclude the capacity of its highest officials. Are then our judges and juries of the present day, according to the theory of their qualifications, equal to this kind of business? If they are not, then either they themselves individually or the law and practice of their courts are at fault. But if they are, then scientific men and experts must not, in the

capacity of assessors or jurors, invade the bench or jury-box, but must be content to assist the Court by their evidence.

I had occasion to consider this subject many years ago, in Scotland, chiefly with reference to a proposal to have science in such cases represented in the constitution of the jury; but, in my opinion, there is no substantial difference between the cases of jurors and assessors; and the argument equally applies for or against the two positions. The whole question was, I recollect, very anxiously considered, and I explained my views in a statement I communicated to one of the legal publications of the day, on the complaints that were then made in Scotland against the system of trial by jury in civil causes; and among which complaints the system of pleading and the method of deriving and settling issues, held a principal place. As the opinions expressed in the paper referred to are still held by me, perhaps the Society will allow me here to read a few sentences from it:

“The complaints, however, that are sometimes heard in Scotland on this subject, do not argue a clear idea of the juror’s office, which they confound with that of the witness. Evidence, especially where it is progressive and in detail, is one thing; the juror’s understanding, to which that evidence is addressed, and by which the whole is to be brought to one general result in the suit, is another. Herein lies the error of those who object to juries; not because they are generally uninformed, but in consequence of their wanting in particular cases that artificial kind of knowledge which skill in a trade or profession can give. Now we think this is not only to take a wrong view of the jury’s province, but to prevent the evidence from being fairly or impartially considered. We must give the jury all legal and relevant aids; and if a scientific or artistic point arises, we must, by the testimony of scientific men and artists, throw all the light we can on the issue; but that issue it is the sole duty of the unprejudiced jury to satisfy. The jury are to take cognizance of all the evidence: of scientific and technical evidence as well as evidence of the fact; they are to entertain everything which the law allows; and by allowing, requires them

to know, that they may form a true judgment on the disputed right. *Ad questionem facti respondent juratores, ad questiones juris respondent judices.* Between these two provinces there is no middle authority ; the jury are to try the fact ; the judge to lay down the law ; but the fact is to be considered with reference to the right or interest in issue. Keeping these principles in view, we discern the real nature of the jury's social and judicial constitution. A jury should be in all respects quite indifferent. The juror is a judge, not a witness ; and he is to decide on information afforded by competent persons, and not from any independent views of his own. That is to say, he is to decide on evidence ; evidence external to his own intuitive knowledge. And anything that interferes with this constitutional relation, whether it be an influence emanating from inherent qualities in the juror individually, or in some other way, by which a bias is created in his mind, so far deranges proper judicial order. In short, the true ideal of a jury is, that they are to proceed to their duty without any presumptive impression as regards one side or the other."

A Scotch case, involving a good deal of the evidence of the kind in question had occurred, and it was complained that,

"Not one coalmaster or mining engineer was on the jury. But this is no good objection. The kind of information which such classes of persons were fitted to supply was purely matter of evidence, and the witness-box, and not the jury-box, was their true place. Their professional skill was not substantially and *per se* in issue, but was merely collateral, and receivable in evidence in order to instruct the minds of the jury on the fact, as that relates to the interest, the right or the wrong, in litigation. And if it is necessary to know about coal driving, and mining, and engineering, by all means let the jury be duly indoctrinated therewith. Put the collier, and the miner, and the engineer into the box ; examine them well and thoroughly ; try and search the depths of their scientific and professional minds, and then dismiss them with thanks for their information ; but do not allow them to interfere further with the case, else the collier may make it too black, the miner may take too much out of it, and the engineer may blow it up altogether ! There

is something more to be done ; there is a general conclusion to which, among other particulars, the scientific evidence is merely inductive ; and although colliers, and miners, and engineers may know a great deal about, and be most useful men in their respective crafts and trades, they may not be the most competent persons for the protection of an interest, the vindication of a right, or the redress of a wrong."

I still entertain these opinions very strongly, and as I have suggested, the argument applies as well to assessors as to jurors; perhaps indeed more forcibly in the case of the former, for, with the notorious bias and jealousy that prevail among scientific persons and persons of skill, from the mere mechanic or skilled artisan up to the Prince-engineer, to have two such assessors sitting with the judge would, I think, involve a hazardous experiment, not only in relation to the authority and dignity of the judicial office, but also with respect to that feeling of confidence in the impartiality and indifference of the judge, which in this country is associated in the mind of the public and the Bar with the efficiency and integrity of the Bench, and which feeling of confidence it would be dangerous to disturb. I therefore entirely concur in the report of this Society, to which I have referred wherein it is stated :

"According to that scheme, assessors should be appointed who should sit with the judge, and should be bound to give their opinion in public, as well as the reasons on which that opinion was formed, the judge, however, not to be bound by the opinion so given. It must be supposed that the assessors would be persons of competent skill ; and it is difficult to understand how the judge would not be morally, if not legally, bound by their opinion, or that any verdict could be supported which went against such opinion. Nor can it be doubted that, if any difference of opinion arose between the judge and the assessors on a matter which the jury must ultimately determine, the latter would be placed in a position of considerable embarrassment. In trials before the Admiralty Court, where the judge is assisted by Masters of the Trinity House, there is no jury ; and after carefully considering the working of the system adopted

in that court, we are of opinion that it is altogether inapplicable to the ordinary mode of trial by jury."

The plan of assessors is further objectionable, inasmuch as it would introduce a lay quality into the judicial element that would hamper the judge, interfere with his discretion, and cause confusion in the trial.

It has also an aspect suggestive of something unconstitutional, by neutralizing or tending to neutralize that undivided responsibility in the judge which is one of the chief safeguards which our legal system affords to the nation.

In every view this proposal for assessors appears to me most objectionable. It is, in my judgment, so inconsiderate and wrong, that it is a satisfaction to me to reflect that it was originated by medical, scientific, and other persons who, from their position and calling, are unacquainted with the delicate character of the conditions of legal procedure, and not from our own profession. Indeed, I say it with all respect and deference, that the proposal is unlaywerlike, because it appears to me to take a low and unworthy estimate of the comprehensive nature of the principles of jurisprudence—the greatest and grandest of all sciences; and I sincerely trust that the impression which it appears to have made on some of the lawyers of this Society may be but transient—that it may speedily pass away altogether, and give place to sounder and juster, and, I may add, more manly notions of legal investigation. I therefore hope and trust that the Society will adhere to its former opinion on this subject, and negative this scheme of assessors.

But, while I am so strongly opposed to scientific assessors and scientific jurors, I am not insensible—it is impossible to be insensible—to the inconvenience that has been experienced in taking scientific evidence, and which will probably continue to be experienced unless some well considered change is made in this respect.

I cannot help thinking however that if trials, especially trials at law, were conducted with a little more consideration and reserve—I had almost said reticence—on the part of counsel,

and with less of that demonstrative anxiety and burly dogmatism of tone and manner by which advocacy, in its more scrupulous development, is too often disagreeably distinguished in our courts,—I say, if there were a better condition of things at nisi prius and the Old Bailey, and if such trials as I have referred to were a little more gentlemanlike, and a little more scholarlike, we should hear less than we do of the evils and drawbacks of the existing system.

But, making every allowance, I still think there is room for improvement, although I trust that the Society will not for one instant admit Dr. Smith's claim that the scientific witness shall occupy at the trial an "independent position," as he calls it. That would never do. The scientific man or the expert, when called on to assist in the administration of right and justice, to use the words of the great charter, must do so as a *witness*, and a witness only—a witness in the ordinary sense of the term. But his services might be considerably enhanced by one or two regulations, to be applied with a due regard to the special nature of the case to be tried. It has been complained, as one cause of the dissatisfaction with this kind of evidence, that the scientific witness often gives it without adequate information respecting the facts in dispute; and it had been suggested that, for the purpose of such evidence at least, the facts should be previously communicated to the witness *in writing*. The answer to this, however, is a forcible one, namely, that many important facts to which the scientific witness may have to speak cannot be known until they are disclosed orally at the trial. Yet, I think, the suggestion made is worthy of the best consideration, and it might be regulated so as to be used with advantage in particular cases. On this subject I venture to propose as follows:—

1st. That rules be adopted by which both parties should be bound, by the form of their pleadings, and other matter of record, fully to disclose the case they are respectively to make at the trial.

2nd. That a written statement, taken from the pleadings, and other matter as may be agreed on, and expressed in as popular language as possible, should, previous to the trial, be adjusted and settled in the presence of both parties, before the judge himself, or his principal registrar, or some other proper officer.

3rd. That an office copy of this statement be furnished to each scientific witness or expert, at a certain time before the trial, and that at the trial the scientific witness or expert should be required to give his evidence with reference to such statement. This would, however, not exclude any relevant amplification at the hands of counsel, care at the same time being taken that the material facts stated are neither added to nor contradicted, the object being that, whatever may transpire at the trial, the evidence of the expert or scientific witness shall still run in the channel indicated by the statement of the facts.

4th. I propose that in certain cases, to be discriminated and regulated, the scientific witness or expert should, so instructed as to the facts, be allowed to give his evidence *in writing*; care being taken by, if necessary, a strict preliminary examination, that the written evidence he puts in expresses fully and conscientiously his mind on the subject. In this written evidence, I would allow the witness to be further examined and cross-examined orally at the trial, but only in the way of explanation, and not so as to affect the witness's credibility.

5th. Where, notwithstanding all these precautions (and others that might perhaps be adopted), there still remains a serious conflict of opinion between or among scientific witnesses and experts, if there are more than two, it might be expedient to adjourn the trial, and that, in the meantime, these witnesses should exchange each others written evidence, meet together and confer together; and, when the trial is resumed, that they should respectively state to the Court whether, and in what respects, their former evidence has been



affected or qualified. I would not then allow any further examination or cross-examination, excepting with the express leave of the Court, on cause shewn; and,

6th. I propose that no new trial should be allowed on the ground of the verdict being against the weight of the scientific or the skilled evidence, nor on any ground involving a rehearing of such evidence; and it might be convenient, in particular cases, that a power should be reserved to the Court to order the scientific or skilled evidence, or the material parts of it, to be entered as facts on the *postea* at law, or in the return of the verdict in equity.

Other rules and regulations might be made with a view of making this kind of evidence more conducive to the ends of justice in our courts than it is considered to be at present. But the above proposals are the result of the most anxious consideration on my part, and I respectfully submit them to the Society.

It will have been observed that I have made no distinction between the cases where the evidence is purely and exclusively scientific, and where it is of a mixed nature. I was at one time disposed to think that the regulations in the former case might be different from those to be adopted in the latter; but on further consideration I think it better that the rules should be the same in the one case as in the other.

In either case the result must be the determination of a question of fact or of right, which is best left to the verdict of a jury.

NOTE.—The above paper is confined, as will have been observed, to the general question of scientific evidence and the evidence of experts, and does not particularize the special case of the trial of patent rights. It is the opinion of many lawyers that these latter require amendment in the procedure of an exceptional kind; and Mr. Thomas Webster has proposed, in a paper he read before the Law Amendment Society, on the 18th of May last, that in such cases there should be scientific assessors to sit with and assist the judge; and that the mode of trial, whether by jury or by the Court alone, should be left to the option of the parties, under regulation as to the nature and circumstances of each particular case. For myself, I confess I am opposed to assessors in all cases—although I can quite understand that the infringement of a patent might often be better tried without a jury.—R. S.

#### ART. IV.—ON AMERICAN SECESSION AND STATE RIGHTS.

THE secession of the Confederate States from the American Union is a fact which cannot be denied, but a question exists in the minds of many men whether this act be illegal or not. The Northern States maintain that the act of secession is an act of rebellion, and therefore illegal; the Southern States maintain the contrary—each justifies its views by an appeal to arms, which, after all, cannot really decide the question upon its merits. The object of the following observations is to place the matter in a clearer light.

Is secession rebellion? To decide this question we must first ascertain what is the legal definition of the term rebellion, and next whether the Secessionist falls within such definition or not?

Vattel, in his *Droit des Gens*, liv. 3. s. 288, says, "The name of rebels is given to all subjects who unlawfully take up arms against the ruler of the society, whether their view be to deprive him of the supreme authority or to resist his commands in some particular instance, and to impose conditions on him."

Jacobs (*Law Dictionary*) says it is "the taking up of arms traitorously against the king by his subjects."

Bouvier, in his *American Law Dictionary*, adopts, with slight modifications the definitions of Vattel and Jacobs. The principle of these definitions is to be found in the writings of Hale, Hawkins, Staundforde, and other English lawyers of repute, under the title "High Treason;" also in the *Corpus Juris Civilis*, under the title "Ad Legem Juliam Majestatis."

The celebrated German jurist, Feuerbach, in his work *Lehrbuch des Peinlichen Rechts*, sect. 162 and seq., thus describes rebellion:

"Hochverrath (*perduellio*) ist die Handlung eines Staats-

unterthaus, welcher an sich und in der rechtswidrigen Absicht des Handelnden darauf gerichtet ist, das daseyn des Staats oder solche Einrichtungen desselben, welche durch das Wesen des Staats überhaupt bestimmt sind, zu vernichten." He wrote a special work on this subject.

The Italian jurist, P. M. Renazzi, in his *Synopsis Elementorum Juris Criminalis*, lib. 4, sec. 38, speaking of rebellion, says:—

"Duo autem ad hujusmodi crimen contrahendum requiruntur, tum ut quid fiat adversus principem vel populum, qui magestate præditus sit, seu polleat summo imperio; tum ut fiat ab eo, qui illi subditus sit sive naturâ, quia natus in ejusdem territorio, sive jure, quia in civitatem receptus, aut bello subactus." See also the *Code Penal of France*; the *Penal Code of New York*, s. 8; and *Livingston's Code*, tit. "Treason," to the like effect.

The American law on treason and rebellion does not differ essentially from its English source. This principle runs through all the definitions, that to constitute rebellion there must be a sovereign authority on the one hand, and a subject on the other, making warlike resistance with intent to subvert such authority.

Assuming these definitions of rebellion to be sufficiently correct and uniform, the next inquiry is whether the Secessionist falls within them or not. It is clear that none but *natural* persons can be rebels; artificial ones cannot. States are bodies politic, and therefore moral or artificial persons (Vattel, liv. præl., ss. 1 & 4); and that the states of North America, both individually and unitedly, are such, is put by American judicial decision, and the opinions of American jurists, beyond dispute. (1 Marsh, Dec. 177; 3 Dall. 447; *U. S. v. Tingey*, 5 Pet. 115; *U. S. v. Baker*, Paines R. 156.) Hence the term "Rebel States" applied to the secessionist states by the Northern ones in their official correspondence and documents involves a legal error. It also involves a legal absurdity in this, that every rebel implies a capacity not only of being indicted for the offence of rebellion, but also, in

case of conviction, of being hung or otherwise executed for the same; which, in the case of an artificial person like a state, is simply impossible.

The question of rebellion, therefore, is one referring not to the state, but to the individual as the criminal; the question of secession from the Union refers to the state rather than the individual; and the question whether a Secessionist (that is, he who combines with others to bring about secession of the States from the Federation) be a rebel or not depends upon the doctrine of state sovereignty. Secession is the withdrawal of a State from the Federation, and if that State be a sovereign power, the act of secession is a sovereign act incapable, as hereafter shown, of *legal* limitation, and may be exercised by the sovereign power at its option. A federal compact to which sovereigns are parties may be terminated by any one of them at pleasure, and any question arising therefrom, being a question between sovereign powers, must be settled by international law, and not by the *jus civile*, or law of a state.

There has long existed in America a political party or section who maintain the dogma of an American nationality, *one and indivisible*, springing from the whole people of the Union, in opposition to those who assert that the nationality is a *composite* nationality, springing from a federation of sovereign states; or, as Mr. Wheaton terms it, in his *Elements of International Law*, p. 57, a "*composite state springing from a league*." That the latter position is the true one will be proved by the following short historical sketch of the growth of state sovereignty, and by the nature of the federation itself. The reader is requested to notice particularly the position assumed by the States, in reference to the three great events of American history, viz., the Act of Independence; the Articles of Confederation of 1777, and the Federal Constitution of 1788, and to judge for himself whether such position was other than that of sovereign independent powers.

Before the outbreak of the American revolution, the colonies

were subject to the British crown and laws, and so far the American subjects by the act of insurrection became rebels. Then came the Act of Independence—an act of the States, and not of individuals, and it was achieved, according to Bancroft (c. 70), in this wise—On the 1st July, 1776, the resolution of independence was proposed in congress of delegates of all the States at Philadelphia. It was sustained by only *nine* of the thirteen States. The delegates of New York State, though present, refused to vote, and withheld their concurrence to a subsequent period. The vote of South Carolina was “unanimously” in the negative. Pennsylvania voted also negatively by a majority of four to three of its delegates; and Delaware was equally divided by its two delegates present. The resolution was then reported upon, but the determination upon it was “put off” to the following day, when the dissenting colonies were thus “squared.” The voting was taken afresh. Delaware’s third member, who had been absent, was “whipped up,” and voted for the Declaration, thus giving a majority of one to that state. Two out of the four Pennsylvanian delegates who voted *against* the Declaration on the first, stayed away on the second, and thus enabled the three in minority on the first, to be in majority in the voting on the second. South Carolina, “for the sake of unanimity, came round,” but New York never voted at all, nor did she on the fourth (two days after) vote for the Declaration of Independence. This Declaration was signed by the different delegates, who affixed their signatures opposite the names of their respective states. Thus Benjamin Franklin and his eight colleagues, delegated by Pennsylvania, put their names opposite the name of that state; Thomas Jefferson and his six colleagues, delegated by Virginia, signed opposite the name of Virginia; and so on with the rest of the states.

In 1776 arose that grand political division of parties into Federalists and Anti-federalists, which has prevailed with varying strength and intensity to the present day. The

Federalists (*see* 5 Marshall's *Life of Washington*, p. 33) sought to aggrandize the power of the central government of the federation at the expense of the power of the several states governments. The Anti-federalists, as their opponents, maintained state independence and sovereignty against central aggrandizement.

The opinions of the Federalists are exemplified by Mr. Justice Story, in his work on the *American Constitution*, sec. 211. He there asserts, that this Declaration of Independence "was not an act done by the state governments nor by persons chosen by them, but by the whole people of the United Colonies, by the instrumentality of their representatives. The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration." Mr. J. Quincy Adams, in his oration of the 4th of July, 1831, Dr. Rush, and many others, have maintained the like opinions. Their object was to prove the establishment of one great indivisible nationality by the Declaration of Independence, thus aiming a blow, *in limine*, at the independent sovereignty of the several states. But to maintain that the Act of Independence was an Act of the "whole people of the United Colonies," viewed as a unit or indivisible whole, is to contend against fact. First, the Declaration itself was that of the "representatives of the several United States of America in general congress assembled," declaring that those states were "free and independent states;" and that, as free and independent states, they had full power to levy war, &c., "and to do all other things which independent states may of right do." In support of which declaration they "mutually pledge each other." The representatives signed the Declaration as representatives of the states opposite their signatures, and which delegated them so to act, and in no other capacity—certainly not as representatives of other states which never authorised them to sign. The expression "United States," means states in union, and simply implies a combination or composition of states.

The term "free and independent states" supports this view; and the "mutual pledging," is the mutual guarantee of equal states, and not of the "whole people of the Union," which as a unit could not guarantee itself. Moreover, the whole people of the United Colonies were not represented, inasmuch as New York was no party to the Declaration, whatever she did subsequently. To support Mr. J. Story's view, we must suppose the act of the "whole people" of the states to have been done "*uno flatu*," which was not the case. The assertion that "the separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed the Declaration," is sufficiently refuted by the fact that the framer of the Declaration was Thomas Jefferson, the staunchest supporter of state sovereignty from the commencement to the end of his illustrious political career, and whose opinions, in the matter of state rights, have more strongly influenced his countrymen even to the present time, than any other American statesmen, not excluding Washington. Added to this, the judicial opinions of the supreme courts of the United States have adjudged that thirteen sovereignties sprang into existence by the Declaration of Independence. (*Chisholme and others v. The State of Georgia*, 3 Dallas Rep. decided in 1793; see also *Ogden v. Gibbons*, 9 Wheaton's Rep.) Several of the states had framed constitutions before and after the Declaration. Thus Virginia framed one in June, 1776; New Hampshire in December, 1775; New Jersey in July, 1776; and South Carolina in March, 1776; and those Constitutions all subsisted in full force and operation long after the Declaration was executed: some are still subsisting; others have been repealed by substitutes; many have been amended, frequently in essential particulars—all which matters go in proof of the independent sovereign action of the several states, and in disproof of superior central sovereign power. The congress which passed the Declaration was founded on a resolution of the Massachusetts Assembly, passed on the 6th of June,

1765, to the effect that it was expedient that a general congress of deputies from all the Lower Houses of Assembly in the colonies, be held to consult on their grievances. The first congress met at New York, on the 1st of October, 1765. From that time till the Declaration of Independence, the deputies could not be considered as representatives of a national government, but merely as deputies of rebel states. After the Declaration, the powers of congress were enlarged, but the members were still mere state deputies.

Between the times of signing the Declaration of Independence and the Articles of Confederation, about two years, the congress of state delegates certainly did many acts of a sovereign nature, which were not within the scope of their delegated powers, but which the urgency of the case rendered necessary and excusable (*Penhallow v. Deane*, 3 Dallas Rep.)—an urgency, however, which did not prove their right.

This congress was an assembly of state delegates, formed for the purpose of carrying on the War of Independence. There was then no federal union subsisting between the states such as existed under the articles of confederation and the constitution.

The articles of confederation were agreed to "by the delegates of the states affixed to their names," assembled in congress, on the 15th of November, 1777, the articles themselves bearing date the 9th of July, 1778. These articles were founded upon a resolution of congress, passed in June, 1776, to the effect that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies." The draft of the articles with a circular letter were sent by congress to the different states, requesting them respectively to authorize their delegates in congress to subscribe the same on behalf of the state, the articles being "earnestly recommended to the immediate and dispassionate attention of the legislatures of the respective states." It is clear that the above resolution of June, 1776, although passed prior to the Declaration of Independence, must have



had reference to the formation of a confederation inconsistent with colonial dependence on Britain.

The very appeal of congress to the states, urging them to consent to subscription of the articles by their respective delegates, is antagonistic to the assumption of sovereign supremacy in the congress at this time, and to the existence of an indivisible nationality. Moreover, the ratification of the articles by the respective states was not simultaneous, for though the majority ratified in 1778, Delaware did not ratify till 1779, and Maryland till 1781—a tolerable proof of sovereign independence of the states. But the second article expressly declares that “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in congress assembled.” It thus appears that the sum of sovereignty in each state up to the execution of the articles by such state was made up of those sovereign powers, jurisdictions, and rights, which it afterwards retained, and of those which it afterwards delegated. The delegated powers, &c., were therefore powers, &c., conferred by principals upon subordinate agents, and such as could be better exercised by the federal congress for federal purposes, than by the states individually.

The history of the United States of America under the articles of confederation afford a painful but irrefragable proof of state sovereignty. The powers vested in federal congress by the articles were undoubtedly sovereign powers, and yet the resolutions of congress, made in pursuance of those powers, and therefore constitutionally binding on the states as members of the federation, operated as “mere recommendations which the states observed or disregarded at their option.” The *Federalist* (Nos. 15 to 22) has vividly described that lamentable state of affairs which filled the minds of most American patriots, even of the good, the amiable, and hopeful George Washington, with despair. Each state seemed to have been actuated solely with the desire of shifting the

burden from its own back to that of its colleagues, and to that end each pulled a different way.

Mr. Chancellor Kent (Comm. p. 221, 8th edition,) says :

“In 1781 a report was made by a committee of congress for submitting to the states an amendment to the 13th article of the confederation then recently subscribed by all the states, in which amendment it was to be provided, that, in case of refusal or neglect of any one or more of the confederated states to abide by and obey the determinations of congress, in respect to requisitions of men and money, agreeably to the apportioned quotas, congress might employ the land and naval forces of the United States to compel compliance by the delinquent states, and to make distress of the property of such state and its citizens, and also prohibit and prevent their trade and commerce with other states and with foreign powers. Mr. Madison and even General Washington perceived the necessity of such a coercive federal power. (*The Madison Papers*, vol. i., pp. 81, 86, 88.) But the power was never formally proposed to the states, or granted ; and if it had been, it never would or could have been executed, without leading to the destruction of the Union.”

The necessity for a more vigorous federal government called into existence the present Constitution, which was framed by the delegates in convention at Philadelphia of 12 of the 13 states ; Rhode Island refusing to send any. The Constitution was dated and published on the 17th of September, 1787, was presented to Congress, and by that body submitted to the states for ratification pursuant to the 7th article of the Constitution, enacting that “the ratification of the convention of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.” It was not so ratified till nearly a year after, and then only by nine of the states ; Virginia and New York hesitating for a time, North Carolina refusing to ratify till November, 1789, and Rhode Island till May, 1790. In truth, there was no unanimity among them. Rhode Island and North Carolina only gave in their adhesion when congress proceeded to enact

“that their manufactures should be considered as foreign, and that the import and tonnage dues should extend to them;” a proof not only of the independent sovereignty of such refractory states (*Fed.* 43), but of the assumed right of the rest to exclude them from the federation, which they could not have done had the “whole people of the Union” been an indivisible nation.

After all the states had eventually ratified the Constitution, their jealousy of the growing power of the central government still subsisted. Although Washington’s letter in convention of the 17th of September, 1787, to the President of the Congress, stated it was “obviously impracticable in the federal government of the states to secure all rights of independent sovereignty to each and yet provide for the interest and safety of all,” yet the anxiety of the states to preserve their sovereign rights and to prevent misconstruction and abuse of congressional powers, caused further declaratory and restrictive clauses to be subsequently added by way of amendments to the Constitution, particularly article 9, whereby “the enumeration the Constitution of certain rights should not be construed to deny or disparage others retained by the people;” and art. 10, whereby “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, were to be reserved to the states respectively or to the people.”

The 9th clause was probably introduced to prevent a misapplication of the well known maxim of law, that an affirmative in some cases implies a negative in all others and *è converso*. (*Fed.* 83, 84. *Cohens v. Virginia*, 6 Wheaton’s Rep. Story Constit. 448.) This clause is very obscurely worded. There are “certain rights” enumerated in the Constitution which are not delegated as the right of each state to appoint electors under art. 2, and yet the “certain rights” in clause 9 seem only to refer to delegated rights. It cannot be affirmed with exactness what these “certain rights” are. At any rate, it seems clear that the rights retained are different from certain ones enumerated in the Constitution, and that such retained

rights shall not be prejudiced in their exercise by the enumeration of the "certain rights." The rights so enumerated probably refer to the delegated rights of congress, which comprise sovereign rights, as hereafter shown. The 10th clause speaks of powers reserved by and to the states individually, in contradistinction to those delegated by them to the federal government, and prohibited by the Constitution to the states individually, so that the reserved powers comprise all those not so delegated and prohibited, the essentials of a reserved power being non-delegation and non-prohibition. Thus, if a power be delegated but not prohibited, then it may be a reserved concurrent power; if prohibited but not delegated, then it may be a reserved power in abeyance; if both delegated and prohibited, then it is not a reserved but solely a delegated power; if neither delegated nor prohibited, then it is solely a reserved power.

These powers, jurisdictions, and rights must, prior to the ratification of the Constitution, have been vested in the states individually, for they were the parties delegating, and not the federal government, for that government only possessed delegated powers (art. 2), and *delegatus non potest delegare*. Moreover, as the whole of the thirteen confederated states did not simultaneously ratify, neither did they simultaneously delegate, the confederation was annulled by the act of the nine ratifying states which had seceded from it and formed a fresh federation. It cannot be supposed that they were bound by two federal governments at one and the same time, with a double set of presidents and representatives. As the purpose of the confederation, namely, mutual co-operation and assistance of thirteen states, was gone by the secession of nine of them, the remaining four were not bound to each other by the terms of the confederation. These four non-ratifying states might have remained in federation on the old footing, or continued as separate, independent and sovereign for ever, and then the powers which by their subsequent ratification of the Constitution they delegated to the central government would have indisputably remained

with them. When they ratified the Constitution, they joined a federal government already formed, and they delegated to it those powers which but for such ratification they must have exercised for themselves alone.

The powers so delegated by the sovereign states to the federal government comprised sovereign powers or powers of a sovereign nature—such as could only be properly exercised by a sovereign. Among them were the power of making treaties with foreign powers—of making laws for the general purposes of the Union, regulating coinage and currency—acquiring foreign territory, &c. The powers so reserved and retained by the sovereign states individually, and not delegated to the federal government, comprised sovereign powers, or powers of an equally sovereign nature as those above delegated. Thus the power of independent legislation by each state within its limits—the regulation of its internal commerce—-independent legal jurisdiction—-independent power as to the militia, the same as to taxes—power to pardon political offences in certain cases—not bound to enforce the criminal law of another state—the right of using military force to put down insurrections within its own limits, and also by the admitted principle that the delegation of certain sovereign powers to the central government was not necessarily exclusive as regards the possession or exercise of such powers by the states severally. The different civil, criminal, and commercial codes of New York,\* Louisiana, Virginia, and other states are examples in proof of state sovereignty, added to which are the different Constitutions of the states, altered and changed by and according to the will and pleasure of each state.

These facts in proof of state sovereignty apply to all the nine states which first ratified and established the Constitution, also to the four others of the original thirteen states which afterwards ratified. But since that time new states have sprung into existence and joined the Union. Vermont, for instance, seceded

\* "The sovereignty of the state resides in the people thereof."—*New York Polit. Code*, sec. 1.

from New York, of which it was part, in 1791, and in 1793 was admitted into the federal Union as an independent state. Several states, especially New Hampshire, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland, encouraged, and all acknowledged this act of secession. Tennessee seceded from North Carolina in 1796, Kentucky from Virginia in 1792, Mississippi from Georgia in 1817, Alabama from Georgia in 1819, Maine from Massachusetts in 1820, Missouri from Louisiana in 1821. These various acts of secession from states were done with the knowledge, consent, and final approbation of the federal government.

As regards what are called the new states, such as Louisiana, Mississippi, Florida, &c., they were created states, and admitted as such into the federation, under art. 4, s. 3, of the Constitution. As soon as admitted, they stood upon the same footing as the other then united states, with precisely the same rights, powers, obligations, and duties, as proved by the resolutions of congress for admitting new states into the Union, and which are generally in the following form: "That the state of — shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever." The fact that the territory of such new states in most cases belonged, prior to their creation, to the states collectively, as a species of partnership assets, and not to any one state in particular, does not at all affect the title of such new state to be considered upon admission equal in all political rights and duties to any of the original thirteen states. The nature of the federal Union also forbids the supposition that one state stands as regards the Union on a different footing to the rest. Texas, it is true, existed as an independent sovereign republic, acknowledged by the United States, prior to its joining the Union; the treaty or compact of union between the republic of Texas and that of the United States in 1845, was a treaty or compact of sovereigns foreign to each other, and by the terms of that treaty the sovereignty of the

republic of Texas was preserved, such sovereign powers being delegated by such republic to the federal government as were essential to the purposes of the federation, and in accordance with the terms of the Constitution of the United States. The case of Texas is important in this, that in the compact of federation its existence as a sovereign member of the Union was expressly agreed to and guaranteed by the United States, which precludes all question upon the point of state sovereignty as regards that state.

From the above it appears that the American Union is a federation composed of sovereign independent states combining for certain purposes of government, but not combining for others. Being in their nature sovereign, these states can be subject to no political superior, and their conformity with the terms of the Constitution or compact of federation is not the obedience of a subject to his sovereign, but rather an adhesion to the rules regulating the federation which each has in conjunction with the rest, as co-equal colleagues, established for their joint guidance and benefit. Being a co-equal sovereign and not a subject member of such union or federation, a state may secede whenever it chooses to do so, nor is it legally liable for such an act. The American judge, Mr. Justice Iredell, in *Chisholm's Exors. v. Georgia*, 2 Dallas, 433, and seq., says: — "The sovereignty of a nation or state, considered with reference to its association as a body politic, may be absolute and incontrollable in all respects except the limitations which it chooses to impose upon itself," which are clearly not legal ones. To suppose a sovereign power to be legally liable, is to admit that it can be at once sovereign and subject. The utmost that an act of non-compliance with, or violation of, the rules regulating the union or federation can amount to, is a moral not legal delict by the recusant sovereign state as regards the other sovereign states, and a *casus belli* if they like to view it as such. The federal government, vested with delegated powers only, is subordinate, and has no proper jurisdiction in the matter. The delegate, as represen-

tative of all the principals, has only to exercise those functions with which it is invested by all such principals. When some of the principals quarrel with the rest as to the right of terminating the compact, the delegate being the functionary of both sides cannot properly interfere, for the question relates to a matter not within its functions. The duty of the delegated federal government is to administer the affairs of the federation so long as it continues. The determination of the compact of federation belongs to the parties to it, and certainly the central delegate is not one, it being the offspring of the federal compact. Whether the federation can be dissolved by any number less than the whole of the parties will appear from a consideration of the nature of a federation of sovereign states. The essential characteristic of a federation of sovereign parties is not only the *voluntas* or will of each one to unite for federal purposes with the rest, but to continue in such union. This will to continue, like the will to unite, originates alone with its possessor, and is determinable by it. It is a will which, being a sovereign will, is legally uncontrollable by a superior power, and therefore may be exercised by its possessor arbitrarily. This purely voluntary nature of a federation of sovereign states will in the case of the United States appear more strongly by assuming the federation to be composed, not of sovereign bodies of men, but of sovereign monarchs. Such a supposition is reasonable and legitimate. We will further suppose that each monarch agrees with all the rest that they shall all exercise jointly certain sovereign functions for certain purposes in each of the states, but that for other purposes each monarch shall alone exercise his sovereign functions in his own state. The consequence of this agreement is that there are two sovereign parties in each state—the joint and the single. The joint party may exercise its functions by subordinates or delegates, in like manner as the single. How long is such a compact binding on each of the parties to it? No longer than each chooses. In case of dissent, it is a dissent of sovereign parties and therefore of co-equals; any violation of the com-



pact must be dealt with by international law, and not by the *jus civile*.

Let the following case be put:—A B C D E F and G being respectively sovereign parties to a federal compact, A B and C secede from it. The dispute then rests between themselves and D E F and G, not between themselves and A B C D E F and G, *i.e.*, the union, for that is at an end. It is also clear that any central government being the delegate of A B C D E F and G, that is, of nothing less than all, has no jurisdiction to interfere on behalf of part against the rest. As regards the interpretation of the federal compact, this must in the last resort be reserved to each sovereign, even where by the federal compact the interpretation of it is delegated to certain judicial subordinates for the sake of convenience. No one sovereign, whether king or state, can be unwillingly bound by the interpretation of the rest, otherwise he or it might easily be stripped of all power by the aggrandizements of the delegated federal government. The encroachments of the federal government of the United States upon state rights have latterly been very great, and fully justify the predictions contained in the address of the Minority of the Pennsylvanian Convention, that a government so organized would soon become corrupt and tyrannical, “and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which, from the nature of things, would be iron-handed despotism.” Even that acute statesman, Mr. Madison, who vindicated the necessity of enlarged federal power so ably in many numbers of the *Federalist*, subsequently felt great apprehensions that such power was being unduly aggrandized. It was the main cause of his separation from his literary and political colleague, Mr. Hamilton, and caused him, in his *Letters of Helvidius*, to remark upon “the alarming extent to which constructive prerogative has been carried by the executive and legislative departments.” The same apprehensive spirit manifested itself in the famous Kentucky resolutions of 1799, and the Virginia

resolutions and report on the Alien and Sedition Acts of the same period. The constitutional history of America is full of antagonism of federal power and state rights. Thomas Jefferson's life was one continued, and at last triumphant, struggle in defence of state rights, and his principles now predominate as being more in accordance with the meaning of federation. From the very presidential chair this statesman proclaimed, in 1803, the right of secession. When Napoleon, being First Consul, offered to sell Louisiana to the United States for 30 millions of dollars, an objection was raised in America against the expediency of the purchase, because the Western States had already a considerable tendency to separate from their eastern brethren; and that when reinforced by Louisiana, with New Orleans for a probable capital, they would infallibly, one day or other, separate, and form a new Union. President Jefferson boldly replied that he saw no inconvenience in the separation; that he only looked upon the Atlantic States and the Mississippi ones as elder and younger brethren, who might remain united as long as it was their interest and happiness; and that there could be no objection to their separating as soon as it became their advantage so to do. That he thought this separation probable may be gleaned from his letters in 1820. "I have been," he writes, "amongst the sanguine to believe that our Union would be of long duration. I now doubt it much, and see the event at no great distance; and the direct consequence of this question (Missouri compromise), not by the line which has been so confidently counted on; the laws of nature control this; but by the Potomac, Ohio, and Missouri, or more probably the Mississippi upwards to our northern boundary." Let any one who desires to estimate the intense antagonism between the federal and the states governments read the journals of Congress, in 1790, on the war debts; on the National Bank; the Excise Bills; the Representation Laws in 1791; the Kentucky right of navigating the Mississippi in 1794; the Pennsylvania excise insurrections; the Alien and Sedition Acts of 1800; the anti-war party of

1812 ; the Hartford Convention of 1814 ; the Missouri Compromise of 1821 ; the Georgian disclaimer of 1825 ; the various tariffs of 1828 ; and subsequently the North Carolina disputes of 1834. In short, the history of Congress is filled with threats of secession—threats which could have no meaning except on the assumption of state sovereignty. It is impossible that those states which have not only the sovereign power of making, enforcing, and repealing laws, but also of making, altering, and superseding their constitutions of government, should be considered little better in the federal scale than enlarged counties or parishes ; and to abolish the sovereignty of state rights is, as Mr. George Mason, in his celebrated letter (2 *Amer. Museum*, 534,) foretold, the stepping-stone to a monarchy.

At this place may be stated an objection, whose only force lies in the reputation of its advocates. Mr. Justice Story, in his work on the *Constitution of America* (ss. 352—360), Mr. Dane, Dr. Rush, Mr. Adams, and many other opponents of the right to secede, have supported their views by an attempt to prove that the Constitution is not a federal compact, because it commences thus : “ We, the people of the United States, in order to form a more perfect union, do ordain and establish this Constitution for the United States of America.” They contend that this is an act of the “ whole people of the Union ”—one and indivisible. It is a repetition of the objection against the Declaration of Independence, and simply contrary to fact. The people who ordained were people of states ; the union to be secured was a union of states ; the ratification was a ratification of the states ; and, as such, was an Act of the States so ratifying, and not of the American people viewed as a unit. The fact of some states refusing to ratify till two years after, which, in principle, is as strong as if they had refused for twenty years, disposes of the argument about the Constitution being ordained by the whole people of the Union. That the Constitution is a compact, appears from the fact of the government, being a “ Federal Government ” (see Washington’s letter

to Congress), that is, a government of a federation; and a federation is of necessity the result of a *fœdus*, compact or league. All the jurists, from Grotius and Puffendorff downwards, affirm a government of this kind as founded in compact; and one of the first of American jurists, Mr. Wheaton, in his *Elements of International Law*, p. 58, copying Barbeyrac, "*Etat Composé*," distinctly styles it a "Composite State," which results from a league; and in p. 75, speaks of the bond of union as a "federal compact." The opponents of secession are aware that directly the fact of state sovereignty is proved, and the existence of a federal compact admitted, their case must fail. Another objection taken by them is, that assuming the bond of federation to be a federal compact, yet it cannot be dissolved, except by unanimous consent. This objection is answered, *in limine*, by the fact that the parties are sovereign parties, and therefore legally uncontrollable. Added to this, is the axiom that our ancestors of a hundred or a thousand years ago, cannot bind us or our posterity for all time to come to their political arrangements. If the sovereign people of Virginia chose to join a federation in 1788, their posterity, from similar motives of utility, may choose to secede from it in 1862. The posterity are as much a sovereign power as the ancestors; and the latter can no more bind the former, than the former can bind the latter.

The history of the world affords abundant examples of the right of people of one age to govern themselves as they please, without regard to the opinions or acts of their predecessors or successors. Mr. Madison, in his *Letters of Helvidius*, thus expresses himself on the point: "If there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government, and establish a new one. The French revolutions of 1789, 1830, and 1848; the Carlist wars of Spain; the recent events of Italy and Greece, all confirm the above principle; and our foreign policy of late years has recognised it. The right of dissolving a federal compact by any number

of parties less than the whole, may be better proved by an American example. Two years after the Declaration of Independence, the Independent States entered into Articles of Confederation. These articles, dated the 9th day of July, 1778, commence thus:—"To all to whom these presents shall come. We, the undersigned, delegates of the states affixed to our names, send greeting. Whereas the delegates of the United States of America in Congress assembled, did, on the 15th day of November, in the year of our Lord 1777, and in the second year of the Independence of America, agree to certain articles of confederation and perpetual union between the states of, &c." Then follow the articles, including one (13th), stating that "the Articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual." The document concludes thus: "And, whereas it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectfully represent in Congress, to approve of and to authorize us to ratify the Articles of Confederation and Perpetual Union, Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and on behalf of our respective constituents fully and entirely ratify and confirm each and every of the Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determination of the United States in Congress assembled on all questions which, by the said confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual." Here it is worthy of note that the ratification was a ratification by states, and not by the "whole people of the Union." Now, if it be contended that federal compacts such as these are inviolable, and perpetually binding on the parties, to them and their successors, by what right was this federal

compact dissolved by them within ten years of its creation? And if it be true, as some (*Fed.* 22) have contended, that the consent of all parties to a federal compact of perpetual union is essential to its dissolution; by what right did nine of the thirteen parties dissolve it in 1788, by establishing a fresh government for themselves under the present Constitution? The plain answer is, By the same sovereign right which enabled each of them to enter into it in 1778.

By the secession of the nine states from the Confederation, the articles became void as to the remaining four states. Had it been contended by one of the four, that the articles still subsisted as between the four, each of the other three might well have pleaded that the articles were void by reason of the purpose or consideration for which they had been entered into, namely, the mutual defence and advancement of thirteen states, having failed, that *that* purpose which thirteen might well achieve, four could not. Here, then, we have an act of secession from a union of states acquiesced in, and not deemed an act of rebellion, nor even a *casus belli*; an act which left the four dissentient states in a condition of sovereign political independence of each other, and of the nine seceders. This is the view taken by one of the framers and advocates of the Constitution, Mr. Madison, who, in No. 43 of the *Federalist*, whilst speaking of the ratification of the convention of nine states being sufficient for the establishment of the Constitution between such states, speaks thus: "Two questions of a very delicate nature present themselves on this occasion. First, on what principle the Confederation, which stands in the solemn form of a 'compact among the states,' can be superseded without the unanimous consent of the parties to it. Secondly, what relation is to subsist between the nine or more states ratifying the Constitution, and the remaining few who do not become parties to it?"

The first question he answers in two ways: first, "by recurring to the absolute necessity of the case, to the great principle of self-preservation; to the transcendent law of

nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed." Secondly, by pleading breach of compact. "A compact," says he, "between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void."\* The second question he answers by distinctly affirming that "no political relation can subsist between the assenting and dissenting states." By this expression "political relation," he means, a political relation of a federal character. Now, if the above arguments of Mr. Madison are valid, as against the Articles of Confederation, what is the essential difference which prevents their application to the Constitution? The sovereignty of the states is indisputable; the Constitution was ratified, like the Articles of Confederation, by the states (whether by the delegates of the people of the state, or by the states' legislature, is immaterial, the ratification was a sovereign act of the state), and not by the "whole people of the Union," viewed as an indivisible nation, the ratification being not a single act, but many acts, extending over considerable periods of time; there was a central delegated government in both cases, which, under the Articles of Confederation, extended to individuals as well as states; and though not so extensively as under the Constitution, still sufficient to prevent all question of its existence; besides, the law reports of the period afford abundant examples in proof; the composite nature of the federal nationality also was as strongly marked under the articles as under the Constitution, the federation being in both cases a federation of

\* Si para una fedus violaverit, poterit altera a federe discedere, nam capita federis singula conditionis vim habent.—*Grotius, B. & P. 2, 15, 15.*

states. There is no essential difference between the two which would prevent the application of Mr. Madison's argument to the case of the Constitution.

The proposition that sovereign power is incapable of legal limitation has been briefly dealt with in the course of these remarks; but a further and more extended proof of it will, perhaps, be not altogether superfluous, as it is the standard whereby the Southern right of secession, and the Northern right of coercion, must be judged, if judged according to the principles of jurisprudence.

The sovereign power of a state (*summum imperium*) may be placed in one person as in a monarchy, or in a select number (oligarchy), or in the body of the people, as in the various states of the American Union. Puffendorff (De J. N. and G. l. 7. c. 5), says: "Summum imperium, prout vel in uno homine vel in uno concilio ex paucis aut universis constante reperitur, diversas formas rerumpublicarum producere solet." The individual or body of individuals possessed of this sovereign power, is properly sovereign; and though in the states of America the exercise of the sovereign power, both federal and state, is by delegates or subordinates; yet the power must always be deemed as residing in the first degree in the principals who delegate and authorise, *i.e.*, in the people. Directly we place the sovereign power in the people, we see the legal irresponsibility of the sovereign with greater distinctness than when that power is placed in one person. The following definition then holds true as regards the American states: "Habet hoc omne imperium, quo universa aliqua civitas regitur in qualibet reipublicæ forma; ut sit summum, *i.e.*, in sui exercitio a nullo homine tanquam superiore dependens, sed ex proprio judicio et arbitrio sese exserens, sic ut ejusdem actus a nemine tanquam superiori queant irriti reddi." (Puffendorff, De J. N. & G. l. 7. c. 6.; Grot. B. & P. l. 1. c. 3.)

In discussing this question, the fact of the body of the people of the different states being the owners of the sovereign power, and for convenience' sake exercising it by deputy,



must be steadily kept in view. Every law properly so called implies three essentials. First, there is the sovereign who enforces the law; second, the subject who is to obey it; and thirdly, the law or command itself. Now, to suppose this sovereign subject to a law is to suppose him subject to that sovereign power who enforces the law, that is, to suppose a sovereign subject to a sovereign, which is a contradiction. To assert that the sovereign power is legally restrained implies the existence of a second party in whom the power of legally restraining such sovereign is vested; such party must then be the real sovereign over the other. But the like assertion of legal restraint may be made against the second party's sovereignty, and then we must suppose the existence of a third party's sovereignty restraining the second, and so on *ad infinitum*. The maxim of the English law, that "the king can do no wrong," that is, legal wrong, is perfectly true, and founded on the soundest principles of jurisprudence; the only objection to the maxim being its irregular expression, the term "king" being incorrect or inexact, the correct and exact term being "sovereign." The sovereign power of Great Britain is vested in the three estates of the realm, king, lords, and commons; the three combined are "the sovereign," and not any one or two of them. In common parlance the king or queen is styled "the sovereign," but it is legally incorrect, all that it really means is that he or she is a member of the sovereign body, not that he or she is sole sovereign, which is political heresy. That "the sovereign" properly so called can do no legal wrong will be proved by the following example. In the Articles, and the Act of Union between England and Scotland, provision is made for the preservation in both countries of their respective Church and Kirk establishments. Now a parliamentary abolition of both these establishments would be probably an unrighteous, but most certainly not an illegal act; it would have been done in due course of law by "the sovereign." So again, the Act of Parliament which determines that the executive of these realms shall be of the Protestant faith

may be repealed by the same "sovereign" power which brought it into existence; there can be no illegality about such repeal, though there may be much moral wrong. In both of the above cases the acts, although not illegal, would certainly be morally wrongful. The best though not unexceptionable designation of such acts is, that they are unconstitutional. The improper suspension of the *Habeas Corpeas* Act, or the passing of the *ex post facto* statutes, called bills of attainder, may be done in due form of law, and therefore legal, but nevertheless the same would be unconstitutional. The remedy for an unconstitutional act rests with the body of the people, who may justifiably censure and resist. If the party exercising the sovereign power has deceived them in the matter, they must deal with that party in the best way they can, and which common sense points out, remembering that if they have the moral end of the staff, he has generally the physical. In the case of America, it would be a dispute between the people of the state, and those to whom they delegated the sovereign power. A constitutional act may be defined as an act of the sovereign, which is in accordance with the general mode of government approved by the nation, or in accordance with those maxims of government received and adopted by the nation. These maxims when put into writing are termed written constitutions. Each state of America has its written constitution in addition to the federal one. None of these comprise the whole of the constitutional principles of American government. The unwritten ones are those maxims which their ancestors brought from England with the English laws. Now, from what has been said, it appears that the states of the American Union, being sovereign states, cannot be legally bound; that as they are not legally bound to the Union, their secession from it is not an illegal act, and that the Federal Government, in attempting to adjudicate upon the right of dissolving the federal compact by the respective parties to it, is clearly going beyond its delegated powers, and acting *ultra vires*. That being so, by what

right can their equals, the Northern states, deny the Southern states the exercise of their rights of sovereignty ; nay, further, assert that the act of secession is a legal crime, upon which the Northern, or non-seceding states, have alone a right to decide? Suppose that all the states of the Union, except Rhode Island, Connecticut, and New Jersey, had seceded from the Union, would the congress under such a state of things be such a congress of the Union as to justify these three small states in declaring all the other states not only rebels, but their property subject to confiscation? Would such an act be an act of the congress of the Union? Certainly not. The principle of the right of declaring people rebels, and confiscating their possessions, must hold good as well in three states as in thirty, although the power of executing it be wanting. It is, however, untrue. The only correct way of dealing with the seceding states by the non-seceding ones is to deal with them as enemies upon a just *casus belli*. If the non-seceding states succeed in overcoming the seceding states, they must stand towards each other as victorious and vanquished sovereigns, and be guided by the rules of war prevalent among the most civilized nations. State trials have no legitimate place in this quarrel.

The inhabitants of seceded states can be no rebels to the federal government by reason of such secession. A sovereign state as member of a federal union of sovereign states cannot, by reason of its sovereign and corporate character, commit treason against the United Government, yet the individual citizens of such sovereign state may do so. For though the citizens may as a body possess, in the first instance, supreme sovereign power, and so far be a sovereign body, as above shown, yet each of them individually may be and is a subject, not a sovereign member of such sovereign body, and is, therefore, amenable to the laws. Each sovereign state, by entering into the compact of union with the other sovereign states, bound its own subjects thereby; and such subjects, in addition to the allegiance they were bound to render to their own sove-

reign state, were also bound to render a like allegiance to the sovereign union of which their own state was a sovereign member. The third article of the constitution points to treason committed against the federation by individuals. Treason may also be committed against any particular state and not against the federation, as laid down in *People of New York v. Lynch*, 11 John Rep., and such treason is properly cognizable only by the judicature of such state, a convincing proof of state sovereignty. But few cases can arise which, being treason against a particular state, cannot by implication be made cases of treason against the federation. Hence the tendency of the Supreme Court of the United States to aggrandize to itself a jurisdiction greater than what fairly pertains to it, and which caused Thomas Jefferson to style the judiciary as the stronghold of federalism. The liability of the citizen of a sovereign state to the laws of that state continues during his allegiance to that state, but the liability of such citizen to the laws of such federation continues only so long as his sovereign state (he being its subject) continues a member of the federation. Directly such sovereign state secedes from the federation its subjects must secede with it, and by such secession they lose all the rights and are free from all the duties which subjection to the laws of the federation entails upon them. They become aliens to the rest of the federation, and though by reason of such secession the relations between themselves and the rest of the federation states and subjects may become very complicated and difficult of solution, the result must be accepted, such as it is, as the result of an act of a sovereign power.

Some American jurists, ignoring the doctrine of state sovereignty, have contended that the states cannot legally secede, and, therefore, their acts of secession cannot be viewed as such, but simply as attempts to do that which they cannot legally do. The fact of secession, exemplified by the withdrawal of representatives from congress, cannot be legally ignored, but must be taken in all its integrity. The law

recognises the difference between an inchoate and a completed act. In martial law he who attempts to desert, but is captured whilst scaling the barrack walls, is not actually a deserter, but he who gets clear off is. So in the criminal law, he who attempts to murder a man is not *in pari passu* with him who actually completes the attempt. The last is a murderer, the first is not. So the fact of secession must be judged according to its nature, and decided to be a perfect, not an inchoate act. And then, in case the North prevails, will arise the question of state rights and legal jurisdiction; and the tribunal deciding it will be a tribunal not of all the states of the Union, but only of those which have not seceded, sitting in judgment upon the members of those which have: a case not provided for by the constitution nor really within it. (*Fed.* 43.)

Assuming the Union to be a federation of sovereign states founded in compact, as it really is, the question arises, how long is any one state bound to continue a member of the federation? The short answer is, only so long as it pleases and no longer. Directly it ceases to derive from the federation those benefits the attainment of which was the object of its joining the federation, then the law of self-preservation and necessity of the case demand that it should, as to itself and the rest, dissolve the compact, as shown in the secession in 1788 from the federation of 1777. The other members of the Union may suffer by such secession, but states are subject to the same natural law which governs individuals, and which justifies the seceding state in saying: "I am not bound to sink that you may swim." And is the seceding state alone to be the judge of the expediency of its secession? Yes, for as the expediency of seceding is founded on a law which transcends all civil laws, namely, the law of nature, and as under that law neither the non-seceding states nor any other power are appointed arbiters in the matter, the right of deciding rests alone with the suffering party. The British race has proved the truth of this argument by many examples

to be found in its history, and not the least notable and pertinent one is afforded by the Declaration of Independence made by certain British colonists in 1775, with which the Americans are probably well acquainted. The connexion of these colonists with the mother country was incompatible with their interests; and they alone decided that the connexion should cease.

The American federation is *sui generis*, and resembles nothing of the kind in ancient or modern times. It is not perfect as a scheme of federal government, but it may fairly claim to be, in its main features, the best possible of its kind. Being a federation, it has all the defects and all the advantages peculiar to that system of government. The bond is only voluntary, so far exposed to dissolution. On the other hand there is the benefit of combination, and, in the event of dissent, the benefit of separation—advantages which are very great. Secession, as far as it goes, is the natural termination of a federation, but to attempt to maintain that federation upon grounds antagonistic to its nature, that is, by force, is to destroy it. The defenders are sapping their own fortress. The great necessary and all-powerful bond of federation is hearty goodwill and co-operation. If these be wanting, the federation exists but in name, it is actually gone. No State trials, no military subjugations, can renew it. The conquered may be bodily coerced, but their minds will be free. The compulsory union binds the willing conqueror as well as the unwilling conquered. It is a union without unity. Whatever they do must lack the vigour arising from combined energies and resolves, and be profitless to them except perhaps as a moral. Far better would it be for the North to admit the principle of secession and to let the South go, especially as there remains to the North an extent of territory and resources which must, in the natural course of things, soon place her above the South, and always keep her in the front rank of nations. Prudence demands that each should part in peace, trusting to a better time and a better spirit for the renewal of that

bond which, had they both been wise, would never have been broken. Let the North remember that "it is," as Owen Felltham says, "much safer to reconcile an enemy than to conquer him. Victory deprives him of his power, but reconciliation of his will: and there is less danger in the will, which will not hurt, than in the power which cannot, for the power is not so apt to tempt the will as the will is studious to find out the means." \*

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#### ART. V.—CRIMINAL PROCEDURE.—PUBLIC PROSECUTORS.

1. *The Eighth Report of the Commissioners on Criminal Law.*
2. *A Bill to provide for the Appointment of Public Prosecutors, and for the Amendment of Criminal Procedure in England and Wales.*
3. *The Report from the Select Committee on Public Prosecutors.* Ordered by the House to be printed, 9th August, 1855.
4. *Judicial Statistics, 1861. England and Wales. Part 1. Police. Criminal Proceedings. Prisons.*

IT is obviously of the utmost importance to the well-being of a state, that its system of administering criminal justice should be rendered as efficient and exact as possible. We therefore offer no apology for drawing attention from time to time in these pages to some of the grave defects which are still allowed to disfigure our criminal procedure, and which the exercise of a little simple but judicious legislation would at once remove. How that legislation should be applied, in one important instance, we shall indicate in this article.

The repression of crime, which forms the proper province of criminal jurisprudence, is effected by two agencies:—First, the detection and defeat of attempts to commit offences;

\* We must not be understood as necessarily concurring in all the opinions expressed by our able contributor.—ED. L. M. & R.

second, the discovery of those who have committed offences, and the application of a deterring punishment. The first is the detective and preventive; the second, the detective and deterring department. The first agency is exclusively that of our police system; the second is partly that of our police, and partly that of our executive. It is with the second that we are about to deal. And our concern will be chiefly with the stages which precede the trial at the sessions or assizes.

When a crime has been committed in this country, the fact is at once brought under the notice of the police authorities. An officer is instructed to take the case; and he institutes an inquiry, which enables him to carry some suspected person before the justices in petty sessions. If upon examination the facts are strong enough to cast grave suspicion upon the accused, he is committed either to the sessions or the assizes. Here then, we have the first two stages of a criminal process: the first stage, between the offence and the apprehension of the supposed offender; the second, between the apprehension and committal. In the first stage, the offices of inquiry, of warning, of pursuit and apprehension, are very properly placed in the hands of the police; and in ordinary cases this duty is done with much energy, skill, and intelligence.

As soon, however, as the supposed offender is taken, the whole aspect of the case is changed. If the crime be one of such magnitude as to take it out of the summary jurisdiction of the justices, the conduct of the case always requires some care, and often requires some experience of law. Fortunately this care and experience are in some measure supplied by an officer who is a necessary part of every petty sessional court. This officer is the clerk to the magistrates. The clerk to the magistrates is almost always an attorney of standing and experience. It is his duty to attend the Court whenever it is sitting; to arrange the order of business; to take down the depositions of the complainant and his witnesses, in each case; to read over these depositions to the deponents; and, in a word, to conduct all the purely ministerial work of the Court.



Often the professional knowledge and experience of the magistrates' clerk render him a valuable adviser, both on points of law and practice. Indeed, as a general rule, the magistrates' clerk does, to some extent, conduct each case on behalf of the Crown—sifting the evidence as it is given; checking the police officers; pointing out to them defects in the case; suggesting the manner in which such defects should be supplied; and, in most instances, advising the Bench on the ultimate questions of dismissal, remand, or committal. It must, however, be remembered, that though this is, in fact, the position taken by the clerk to the magistrates, and though, indeed, it is a position which he must almost of necessity assume, these functions of *quasi* prosecutor are not within the scope of his proper office, and are not legally recognised. Nor, in those sessional divisions where the criminal business is large, is it possible that the clerk can, under the existing arrangement, exercise more than the most cursory supervision over the cases as they come pouring in. This is all that the present scope of his duties requires of him. On this basis his salary and staff are fixed. It would therefore be unreasonable to expect that he will give close attention to the more serious or intricate charges, which present difficulties in law or fact.

The next stage is the interval between the commitment and the presentment to the grand jury. After committal, the officer to whom the warrant was first handed, or who first apprehended the accused, still retains charge of the case. As a rule, it goes to the sessions or assizes, just in the same state in which it was presented to the examining magistrates. The practice is for the clerk to the magistrates to hand copies of the depositions (not unfrequently through the police officer) to an attorney, who takes the fees allowed by the Treasury for prosecutions. These fees are very small: so small that they would not repay a respectable attorney in moderate practice for giving any proper attention to the prosecutions, even if he got them in large numbers. It follows, that

wherever these prosecutions are open—as is mostly the case—\* they are sought after, and conducted by attorneys of a low class, who seldom do more than place a copy of the depositions in the hands of counsel.† In the meantime, the original depositions are forwarded to the clerk of indictments for the Court to which it goes. He prepares the indictment.‡ The accuser and his witnesses are brought by the police-officer who superintends the case, to the sessions or assizes. There the indictment is handed to the prosecuting attorney, who has arrived with his brief, which, as we have before remarked, is merely a copy of the depositions. At sessions, the depositions are not often preceded by any statement of the case; but at assizes they always are. This statement, in most cases, is nothing more than another copy of the depositions put into the third, instead of the first person. Of course, the police officer, if he be intelligent and active, has mastered the details of the charge; and, between the commitment and trial, has looked after it. Sometimes an additional link of evidence is wanting; he supplies it—sometimes there is ambiguity in the evidence already obtained; he clears it up. But every effort of his has been made under the bias of natural zeal for a conviction. The results of these inquiries are supplied to the prosecuting attorney, and put into the brief. When the prosecuting attorney meets the prosecuting policeman with the witnesses on the morning of the assizes, he hands him the indictment, and there generally, in the present state of things, his duty ends, so far as the prosecution goes.

The policeman then undertakes the conduct of the case through its next stage, which is the presentment of the charge to the grand jury. He collects and marshals the witnesses, takes them into the grand jury room, and the bill is presented

\* At Liverpool and Manchester the prosecutions are managed by attorneys appointed by the Town Clerk, at a fixed salary. At Leeds, by a kind of compromise, the cases are handed to three attorneys, who act as joint prosecutors, and divide the fees.

† *Report on Public Prosecutors.* Richardson, QQ. 872, 873; Hemp, 883—886; Goodman, 2,219—2,224.

‡ In serious or difficult cases it is drawn by counsel.

to the foreman, who also has the depositions before him. The grand jury have no professional assistance. At sessions they are generally respectable merchants and tradesmen; at assizes, they are composed of the leading gentry in the county. It need scarcely be added, that the grand jurymen at sessions are ignorant of even the rudimentary principles of criminal jurisprudence. At assizes, its members are mostly men of education, and have often had some experience in the practical administration of the criminal law.

Before the grand jury an inquiry takes place, which, to some extent, resembles that made before the examining magistrates. It is, however, much less close, searching and accurate, being conducted privately, and without the assistance of a clerk,\* who is always present at petty sessions. It follows, naturally, that the investigation is usually of the most imperfect kind. With the grand jury, however, rests the absolute and uncontrolled discretion of deciding whether the charge should be sent before the Court. If they decide that it should, and bring in a true bill, we reach the last stage. The prisoner is arraigned or put upon his trial.

Now, the object of putting a man upon his trial is to ascertain whether or no he has committed a crime alleged against him. But, inasmuch as it is a matter of grave moment to the individual, that such suspicion should rest upon him as requires a trial; and as it is of still graver moment that such suspicion should not be allowed to remain upon his character without just cause, we find two principles resting at the very foundation of true criminal justice. First, that suspicion

\* Mr. Markland, one of the attorneys employed at that time to conduct the prosecutions at Leeds, says, in his evidence before the Select Committee on Prosecutions, that he "had been frequently called in before the grand jury to explain."—(Q. 802.) We believe, however, that this is most unusual, and we question whether the present constitution of the grand jury allows of such interference. In the Eighth Report of the Commissioners on Criminal Law, it is expressly stated that the prosecutor only "may attend the grand jury to assist in conducting the evidence on the part of the Crown." (Art. lxix.) The only exception seems to be that of allowing counsels' attendance in charges of high treason.—12 Viner's Abridgt. 38; Hawkins' Pleas of the Crown, 62, c. 46, s. 93. Corner's Practice, 723.

of a crime shall not be attached to any one without good reason; and, secondly, that when once suspicion has been publicly attached, the charge should be carefully sifted, with rigorous impartiality. These two great principles have now become clearly recognised in our criminal code; but in our system of criminal procedure, we find them constantly opposed to and in antagonism with the well-known rule, that "certainty of punishment is the greatest preventive of crime."

From this opposition and antagonism, a double evil arises in the following way: The prosecuting officer at present is the police officer. He knows that his promotion depends upon his showing energy, skill, and intelligence in the detection of crime. He, of course, instinctively acts upon the rule. On the other hand, the magistrates and their ministerial officer are bound to act upon the two great principles; and if this counter action were properly directed and controlled, nothing could be more salutary. Unfortunately, the correlation of the rule and the principles is not perfect. There is an intermediate controlling force wanting. The policeman—or present prosecuting officer—may be clever, diligent, earnest, persevering; but his very position robs him of one essential quality for this post. He can never be unbiassed; he must be a partizan. His great object is and always must be, to find an author for every crime. Were he under the control of some one whose position raised him above the temptations which he finds irresistible, all this assiduity and strong personal interest in the pursuit of criminals and their detection would be invaluable. But this control is wanting; and the consequence is, that in the year ending December 31, 1861, 8,794, or 32·4 per cent. of the 27,174 persons who were apprehended on suspicion of having committed indictable offences, were discharged upon examination before the magistrates.\* Nearly one person out of every three taken into custody left the police court innocent in the eye of the law of the crime laid to his charge. Many probably of those discharged are,

\* Judicial Statistics, 1861, table 3, p. 12.

in fact, guilty. If so, a skilful, educated, and intelligent attorney dealing with the case as it arose, would have placed it before the Bench in such a light that there would, probably, have been a committal instead of a discharge. It is equally certain, that many of those discharged were innocent; and a similar supervision would have saved these innocent men and women from the pain, the exposure, and the infamy of a public criminal examination.

It is plain, therefore, that there is here an important defect in the machinery of our criminal procedure. Some official is wanting, to whom the injured shall be able to come as of right for advice; to whom the police officer shall come for instruction and direction in all cases of emergency or difficulty; to whom, not merely as *amicus curiæ*, but as an assistant, responsible for the proper management of each case, the justices may always turn for information; and, lastly, to whom the innocent accused may submit the *indicia* of his innocence, with the confidence that they will be carefully, conscientiously, and impartially examined. This officer—wanting only in our scheme—present, in some form or another, in every other civilized state, is the Public Prosecutor.

Yet, no system of criminal jurisprudence, no political or social conditions exist, in any other state, which are so well adapted for such an officer. We have a public preliminary examination: the whole proceedings, from the time at which the accused is charged to his trial, are before the world: we have a press, which records, with only too scrupulous fidelity, what occurs in our criminal courts: the principles of our criminal code are broad, sound, and humane; and our constitutional privileges are so firmly established, that we have no need to fear any political danger from the creation of a Crown office for the pursuit of crime. Conservative prejudice alone has hitherto opposed the arguments which thoughtful and practical lawyers have long been using in favour of the change. Those arguments began to attract notice when Bentham propounded his scheme for Govern-

ment Prosecutions; in which he made the Government a party in all penal cases, and created a Public Prosecutor, under the name of "Immediate Government Advocate."\* Beneath the quaint and pedantic language of this profound jurisconsult, indeed, lies the form of a perfect system of Public Prosecution; and the principle may be clearly traced in the plan we are about to put forward. From that time onwards to the present day, there has been constant agitation and discussion upon the subject. It was brought forward in the circular questions of the Commission on Criminal Law. The circular was sent to all the justices' clerks in England and Wales, and to a large number of men whose experience in all departments of criminal practice qualified them to form a sound opinion as to the suggested reforms. The answers sent in reply to the circulars are printed in Appendix A to the Eighth Report of the Commission. Amongst them are an exhaustive and able letter from the Committee of the Society of Justices' Clerks; and Mr. John Pitt Taylor's admirable article on criminal procedure, which was written in answer to the circular, and was originally published in the *LAW MAGAZINE*. This inquiry produced an agitation which at last compelled the attention of the Legislature. And, in the year 1855, Mr. Phillimore brought forward a Bill for the appointment of Public Prosecutors. Against this measure many practical objections were raised. It was, however, referred to a Select Committee, composed of men more than commonly fitted to deal with the question. Amongst its members were the present Chief Justice, Lord Chelmsford, Sir George Grey, the then Lord Advocate (Right Hon. James Moncrieff), the then Solicitor-General for Ireland, and the Rt. Hon. Joseph Napier. Its report, and the evidence on which that report was founded, were presented the same year. During its session, witnesses drawn from all ranks of the profession—witnesses carefully selected for their varied experience in criminal practice—were examined. Amongst these witnesses

\* "Constitutional Code," Works, vol. 9, p. 23.

was an ex-Chancellor,\* who for close upon half a century had wrought with ceaseless and successful energy in the field of law reform, who, as far back as the year 1833, had fully expressed his views upon the subject before another Committee of the House, and who now repeated these views with great force and distinctness. Another of the witnesses was the Lord Advocate of Scotland, who, holding the position of Minister of Criminal Justice for that part of the State, was able to place before the Committee a complete and lucid account of the system of Public Prosecution, which had for many centuries obtained in Scotland. The then Chief and the present Chief Justice of all England (at that time Attorney-General), also laid before the Committee their views upon the question. And it may here be observed that the statement of the last-named judge, is a model of such evidence; clear, concise, luminous, and moderate, it explained the existing system in all its details; it showed its defects; it pointed out the remedy for each defect, and at the same time pointed out the practical difficulties which would have to be dealt with in adopting each remedy. Again, another witness who was examined had been Attorney-General for Ireland, and being a man of great ability, had mastered the system there used. He was, therefore, able to explain it very clearly. Moreover, there were consulted and questioned by the Committee, the Recorders of London and Leeds; the Clerks of the Peace for York and Leeds; the Clerk of Arraignment to the Central Criminal Court; the Under-Secretary of State for the Home Department; the Solicitor to the Treasury, who conducts all the State prosecutions; the clerk to the magistrates for Leeds; the attorneys appointed to conduct prosecutions at Liverpool, Manchester, and Leeds; several officers appointed to examine and tax the costs of prosecutions on behalf of the Treasury; and many others who as attorneys, barristers, or otherwise, had been so

\* Lord Brougham.

placed as to gain a practical knowledge of some branch of our criminal procedure.

In this large body of evidence there are of course differences of opinion as to details, but upon two points all the witnesses were agreed. They all agreed that the present system was very defective, and that it is capable of great improvement. We will briefly state the grounds upon which the witnesses founded these conclusions. We will then point out the defects which rendered the measure proposed by Mr. Phillimore impracticable; and we will, lastly, offer a scheme which we think would prove equally simple and efficient. It is necessary, however, that we should keep clearly before us the general proposition that "it is the duty of the State to detect crime, apprehend offenders, and punish them, and that independently of the interest of a private party."\* This proposition in itself contains all the objections to the existing system, which were pointed out in detail by the witnesses.

It is a great principle of criminal jurisprudence which has been adopted in every civilized state except our own. Here alone there is no officer of justice to whom "the poorest man may come and desire him to conduct his case when an offence has been committed against him."† The injured person may, to use Lord Denman's words, be "helpless, ignorant, interested, corrupt."‡ Yet he, and he only, can take action. The injury done to him may be, and in most cases is, an injury done to the whole society of which he is a member. Yet upon him is entailed the duty of originating and directing a prosecution. "It may be said," to quote the words of another witness,§ "that a person injured knows perfectly well, practically speaking, that if he goes before a magistrate, and says he has a charge to make against a particular individual, the

\* Evidence of Advocate General, Q. 111.

† Chairman of the Committee, Evidence, Q. 2,400.

‡ Answers to Questions of Commission on Criminal Law. Eighth Report, Appendix AA.

§ Evidence of Sir A. Cockburn, Q. 240.



magistrate will grant a summons or a warrant, as the case may be." But as he justly adds, "where the shoe pinches is this: that in such a case there may be a very good case for a conviction, supposing you have all the evidence necessary. But this man has not the means for getting it together, nor sufficient information as to the precise nature of the evidence which will constitute legal proof of the offence. And, therefore, though an offence has really been committed, and he has sustained an injury thereby, and the party offending ought to be brought to justice, he is brought to trial, but is not brought to justice. He is acquitted where he should be convicted."\*

Again, to adopt the dictum of Lord Denman upon the general proposition, this private prosecutor "is entirely irresponsible; yet his dealing with the criminal may effectually defeat justice. He may be interested, he may be corrupt, but the State can exercise no control over him." It can be no matter for wonder then, that we find the witnesses successively pointing out a series of evils in our criminal administration, which are caused by this radical defect in the preliminary examination. Failure of justice, it was said, constantly occurs through the absence of some competent officer, during the first stage of the inquiry; first, by the apprehension of persons upon suspicion so slight as not to justify any public examination at all; secondly, by the escape of offenders for want of efficient and skilful conduct in making such examination. The chief advantages of a public prosecutor at this stage would thus be, that suspicion would be prevented from falling publicly upon the innocent, and that at the same time greater security would be afforded against the escape of the really guilty. We need not urge the grave importance of these two safeguards. Yet, at the very first step which converts the citizen into a criminal, which brings him before the public with the ineffaceable stain of a criminal accusation fixed upon his character, we find no attention given to either of these objects. The charge may be most frivolous and unfounded, yet it may be at once

\* Evidence of Sir A. Cockburn, Q. 240.

publicly preferred. The crime may have been committed with practised dexterity and the most subtle forethought, such as only the ablest and most experienced practical lawyer can deal with, yet it is allowed to be handled by a bungling police officer. Therefore it is we find, as we have already stated, that 32·4 per cent. of the persons apprehended in 1861 were discharged upon examination before justices, and that 4,423 were acquitted upon trial.\* But the tables reveal another fact of a very startling nature. It appears that of the twenty-seven thousand and odd persons apprehended in 1861, no less than 5,404 were of previous good character, and 6,796 were of "character unknown," that is, against whom no previous evil conduct was known.† The tables do not distribute into classes the persons discharged or ultimately acquitted. We only know that a large proportion of those apprehended bore previous good characters; that a still larger proportion bore characters which were not proved to have been before stained by crime; and that the number of those, sooner or later discharged, was a trifle larger than the numbers ranged under these two classes. Judged by the just standard of our criminal law, nearly one-half of those arrested were innocent of the offences imputed to them. Very little less than one-half had not been suspected or known to have ever committed a criminal act. Yet these men and women had been taken into custody; had been taken before magistrates; had been imprisoned, in many instances for long terms; had suffered the misery of separation from their families and homes; had suffered serious loss in their business; and when released even at the door of the magistrate's court, had come back to their homes, their shops, or their daily duties, with the miserable shadow of suspicion upon their lives.

There can be little doubt that a large proportion of those thus discharged or acquitted were morally as well as legally innocent. There can be as little doubt, if we are to

\* Judicial Statistics for 1860, table, p. 45.

† 5,759 were "known thieves."

believe the unanimous statements of the witnesses examined before the Select Committee, that most of these innocent persons would have been saved the humiliation and the expense of a public examination if only the charges had been previously and carefully looked into by an experienced, intelligent, and conscientious Crown officer. Of course, the balance of these persons, discharged or acquitted, who were not really innocent were guilty. Every witness concurred in thinking that the superintendence of these cases before commitment by such an officer would, at all events, have ensured the trial of the charge before a jury.

And in the second stage, between commitment and presentment, we find emphatic stress laid upon the utility of a public prosecutor. "Does your Lordship," asks the Attorney-General of Lord Brougham, "does your Lordship think that our present system is defective in this respect: that there is no one to see that the evidence is complete, so as to ensure conviction, where a conviction ought to take place between the time of commitment and the time when the bill is found and the trial takes place?" "That, no doubt," replies the venerable ex-Chancellor, "is a grave defect."\* "Has it never happened to your Lordship to see a criminal case very ill got up for want of sufficient evidence being brought to convict the prisoner?" "Yes, very often." "Would not a public prosecutor prevent that?" "Most undoubtedly; and, therefore, I wish to have a public prosecutor." Such were the opinions of the late Lord Campbell.† "I think," says the present Lord Chief Justice, "I think it very often happens that cases are brought to trial which are only imperfectly got up, and that they break down from the want of some superintending and controlling power to get the evidence together, and see that it is complete."‡

So, too, it was shown that the want of a proper person

\* Evidence of Lord Brougham, Q. 58.

† Evidence, QQ. 694, 695.

‡ Evidence, Q. 2,394.

especially charged with the conduct of prosecutions renders their management at the trial very imperfect. For here the "superintending and controlling power" is equally needed to watch the case, to marshal the evidence, to direct the police officer, to instruct the counsel.

Nor were the moral benefits which would result from such a change less strongly insisted upon. It was urged that the administration of criminal justice would thus be rendered more uniform and equitable, at the same time that it would be far more perfect and economical. It would give to a calm, unbiassed, and responsible officer a discretion now unfortunately placed in the most improper hands. It would afford a safeguard against collusion, against private malice, against unjust compromises. It would ensure the pursuit, detection, and punishment of crime, whether in high or low places. It would raise the poor and the weak above the reach of wealthy oppression, brutality, or false accusation. It would place all classes as much on an equality as is possible in the existing state of society. It would give the innocent a fair opportunity for proving their innocence. It would make a stumbling-block for the feet of the wicked.

But whilst all the witnesses concurred in approving of the principle of Crown prosecutions, all saw great practical objections to the scheme embodied by Mr. Phillimore in his Bill. That Bill proposed to divide the counties into districts,\* and to appoint one or more barristers,† of not less than ten years' standing, at a salary of not more than £1,500 a year, to conduct, under the title of "Public Prosecutors," all the criminal prosecutions in each of these districts. Subordinate to these officers, the Bill provided "Assistant Public Prosecutors:‡ —five for Middlesex and Westminster; one for every other county, or sessional division of a county; one for every two counties in Wales; and one for every such borough as might be fixed. The salary of each of this tribe was to be not more than £300 a year.

\* S. 1.

† S. 2.

‡ S. 3.

Thirdly, the Bill proposed to give what was termed a "district agent" to any county, division, riding, or borough, as might be thought fit. This officer was to be an attorney of not less than seven, or a barrister of not less than five years' standing.

And, lastly, each petty sessional division was to have an attorney of not less than three years' standing. The salaries of the two last-mentioned officials were not fixed.

The remedy wanted was a simple one. Here was machinery of the most complex kind, most difficult to organize, and a source of vast additional expense; worse still, it was not needed. Those who have dealt much with ordinary criminal business know how simple and clear the great average of petty criminal cases are. With most, even of the graver cases, all that is required is some knowledge of the principles of criminal law, activity, vigilance, and conscientiousness. During the year 1861, 50,809 indictable offences were committed in England and Wales;\* but of these, only 2,473, or less than one-twentieth, were offences against the person, which rank first in gravity. There were only 5,062 offences against property, with violence, which rank second. The third class, namely, offences against property, without violence, includes larceny, embezzlement, and fraudulent obtaining, or receiving. These are clearly the mildest forms of crime; their number was 40,242, or almost exactly four-fifths of all the indictable crimes committed. Doubtless, some of these offences were of magnitude and importance. Many of them involved nice questions of law; all of them required careful superintendence by an alert and energetic officer. But there were few of these cases which an experienced magistrate's clerk of average intelligence could not have dealt with effectually if his attention had been fairly given to them.

If we take a smaller area in detail, this fact will be readily proved. The West Riding of the county of York is divided into ten police districts, namely:—the County, the boroughs

\* Judicial Statistics, Part I., table 5.

of Bradford, Doncaster, Halifax, Leeds, Pontefract, Ripon, Sheffield, and Wakefield, and the town of Huddersfield. In these ten police districts 2,501 indictable crimes were committed during the year ending the 29th September, 1861.\* The county district, of course, has the largest number of crimes (846). Next comes Leeds, which had 626; then Sheffield, 400; Bradford, 337; Wakefield, 122; Halifax and Huddersfield, 54 each; Doncaster, 34; Pontefract, 23; and Ripon, only 5. Each of these districts is well able to manage its crime without a permanent standing counsel; for such, in fact, would have been the official provided by Mr. Phillimore, under the name of "Public Prosecutor." Two or three cases in a year at a place like Leeds or Sheffield, and a case now and then in the county district, present difficulties in law which make the opinion of a leading criminal barrister very desirable. But this opinion can be readily obtained from London, and is sure to be as good as if it were obtained from some counsel resident in the district. If no nearer approach were made to the formation of a Ministry of Justice than the appointment of standing criminal counsel, as assistants to the Attorney-General, to whom all cases of intricacy or difficulty should be referred from the country, every object would be attained that could have been attained by the appointment of Mr. Phillimore's army of "Public Prosecutors," each with a salary of £1,500 a year.

The same objection applies to the "district agent," who would be equally unnecessary. All that is wanted is, some person properly qualified by a legal education, and attached officially to each petty sessional court; whose duty it would be to attend the Court, not merely on special occasions, but whenever any indictable charge is preferred. His functions should be to watch the case as it is opened, to observe the demeanour of each party, and, if necessary, to take the conduct of the prosecution into his own hands. No person is fitted to carry a criminal charge before that ultimate tribunal, which is to

\* Judicial Statistics, table 3, p. 12.

decide finally as to the guilt or innocence of the accused who has not thus been present and noted the vivid and suggestive action which attends the opening of the case before the justices. Except in rare instances of strictly legal and technical points, the perusal of the statements and depositions is a very imperfect means of mastering a criminal charge; and we think that the efficacy of any system of prosecution depends far more upon the way in which the case is conducted before commitment, than upon the way in which it is subsequently managed. Of course, we exclude those offences which approach the conditions of *causes célèbres*. We mean that the pursuit and detection of every ordinary crime is within the scope of any properly educated and intelligent attorney; that he will be better able to handle it, and to get at the bottom of any mystery or difficulties which may surround it, if he be present from the very beginning of the inquiry; that he seldom needs any technical assistance, and when he does, can always get it speedily from London.

It is clear that those who have hitherto taken this branch of law reform in hand, have been at great pains to create needless difficulties in treating it. A careful consideration of the system which has been approved by long experience in Scotland, shows that a method, which is singularly simple, works in the main with complete success. A large staff of officials would do no good; all that is really required, is a proper Crown attorney for every sessional division, and a similar officer for every large borough.

The only practical difficulty is, to add this new functionary to our present machinery, without disarranging it; and even this difficulty is far less real than it seems. In every petty sessional division of a county, and in every borough, there is already an attorney, who acts as clerk to the magistrates; and who is usually a man of character and skill. His present duties have been already described; and we have pointed out that he is often almost involuntarily obliged to act as a *quasi* prosecutor. We can see no reason why he or his deputy

should not officially conduct or superintend the prosecutions from his court. His position in itself answers most of the conditions required for an efficient public prosecutor. His presence is necessary at the hearing of all charges preferred in the court to which he is attached. He takes down the depositions, which actually embody the evidence, or, at all events, the main part of the evidence, in every prosecution or indictment. He is, as a rule, versed in the principles and acquainted with the practice of criminal law. He is necessarily familiar with the mechanical and technical part of its procedure. In his hands, the labour would be far less than when the case is passed after commitment to an attorney, who has to master its details from the written statement, which the clerk has himself elicited and arranged. He is well known to, and exercises natural authority over the staff of subordinate officers, who collect the facts. He is in a position which enables him to gain a large personal knowledge of local offenders and their antecedents. All these are conditions and qualifications which it would be impossible to find elsewhere; and they are countervailed by few disadvantages. One, and only one, we find raised in the whole body of evidence taken before the Select Committee. It is, that if paid by fees, a great inducement would be afforded to frivolous, or needless commitments. We do not think that if the mode of payment remained on its present footing, there would be any more needless prosecutions than there now are; at all events, every ground for suspicion could be effectually got rid of by a commutation of the fees for a fair additional salary.\*

It may be urged that there is a certain inconsistency and antagonism between the dual functions of a clerk and prosecutor. Certainly, if these functions were co-existent, they would be antagonistic. But they never could be co-existent.

\* In their letter to the Commissioners on Criminal Law, the Committee of Justices' Clerks suggested a daily allowance of £5 5s. to each clerk during his attendance at sessions or assizes. We see graver objections against this expedient than against fees, and think that the difficulty can only be met by a permanent salary, commuted upon the principle explained further on.



The clerk would be simply a clerk until committal. As soon, however, as the commitment is made out, he would be "*functus officio*" as a clerk, and would be at once clothed with all the duties and responsibilities of a prosecutor. The clerk will do all that he has hitherto done. He will sift the evidence, take down the depositions, often cross-examine a witness. Should any question of law arise, he will, possibly, be conferred with by the justices. If he be a man of judgment and good sense, they may, perhaps, ask his opinion as to the advisability of committing. But the question of a commitment or discharge, finally rests with the justices. And the expression by the clerk of an opinion, when it is asked by the justices, does not cast any direct responsibility upon him. As soon, however, as the committal has been made, the responsibility is shifted on to his shoulders. The conduct of the case is in his hands. Defects in the evidence must be rectified by him, doubts must be removed, or difficulties disposed of. Should circumstances arise, which persuade him that the accused is innocent; or that a conviction cannot be obtained; or that the prosecution has been instituted from corrupt motives; or that public policy would be best served by not pressing it; in any of such cases it would clearly be his duty, and should be in his power, to lay the facts before the justices for their reconsideration. He would thus be able to shift all responsibility from himself on to the Bench. Their decision exonerates him. It is not reasonable certainly to oblige unpaid judges to take this responsibility in cases of doubt as to matter of fact, or difficulty as to matter of law. But the appointment of standing criminal counsel would allow of their obtaining an authoritative opinion for their guidance in such emergencies.\*

The economical merits of such a system are obvious. There are, we believe, between 500 and 600 petty sessional

\* The Committee of the Justices' Clerks' Society do not even allude to this objection; on the contrary, they express a "sincere and deliberate opinion that the clerks to the petty sessions of the division would be the best persons to perform this duty."

divisions in England and Wales. A large proportion of these divisions, particularly in the agricultural counties, are sparsely inhabited, and have very little criminal business. The great centres of manufacturing and commercial industry, from their large population, the quantity of exposed property, and the other opportunities for crime which they afford, naturally attract the criminal classes. The consequence is, that the pursuit and detection of crime is chiefly conducted in our large towns. The census returns for 1861 give the West Riding of the county of York a population of 1,507,511. In the year ending September 29, 1861, the indictable offences committed within its limits were 2,501. But of these offences 1,463 were committed in the boroughs of Leeds, Bradford, and Sheffield alone.

The other six town police districts afforded 258, leaving only 846 indictable crimes to be distributed over the whole of the rural parts of the Riding. When, however, we examine the statistics of the detection of crime, we find that in the year ended September 29, 1861,\* only 1,735 persons were apprehended for the 2,501 offences committed, and that of these only 1,088 were committed or bailed for trial.

For the million and a half of inhabitants in the West Riding there were 1,088 prosecutions by indictment during the year. Of these, the three boroughs, Leeds, Sheffield, and Bradford, had 550; rather more than one half. The other six town police districts had 161 between them, leaving 377 to be divided amongst the county sessional districts. These sessional districts are 24 in number. Distributing the 377 indictments roughly, but for our purpose quite accurately enough, we find an average of about 15 prosecutions for each magistrate's clerk throughout the county sessional divisions of the Riding.

Mr. Horn, the clerk of arraigns on the Western Circuit, in his evidence before the Select Committee on the Prosecutors

\* Judicial Statistics, 1861, table 3, p. 12.

Bill,\* gave a return of the attorney's fees on each prosecution, which made the average £2 3s. 2d. per case. We believe this is a correct estimate, taking the prosecutions at the sessions and assizes, and that two pounds may be safely assumed to be the average net profit made by the prosecuting attorney in each case.† If this average be allotted to the West Riding prosecutions according to the returns analysed above, the following fixed salaries might be allowed to a Government prosecutor, without adding to the existing expenses of prosecutions:—

Leeds . .	£564	Wakefield .	£112
Sheffield .	346	Doncaster .	66
Bradford .	190	Huddersfield	60
		Halifax . .	56

A sum of £782 would remain to be distributed amongst the sessional districts of the county and the small borough and liberty district of Pontefract and Ripon. These salaries might be allowed without any direct additional charge, and such an arrangement would materially reduce the cost of prosecutions in other ways.

In the larger boroughs, of course, the magistrates' clerk would be quite unable to undertake the duties of public prosecutor in person. At Leeds, for instance, a deputy would be required, whose services should be exclusively devoted to this department of the criminal business of the borough. At Sheffield and Bradford, an experienced clerk would have to be added to the existing staff of the magistrates' clerk; but his time would not be by any means completely occupied by the work connected with prosecutions. These deputies or clerks would, of course, act under the direction of the magis-

\* Evidence, Q. 2,688.

† The fees vary very much at sessions and assizes throughout the kingdom. At the Manchester sessions the allowance is £2 10s. for each ordinary case: and at Liverpool the allowance in similar cases is £2, though the public prosecutor receives a fixed salary at both towns. At Leeds the sessions' allowance is only 17s. 2d. per case, which is divided among the prosecuting attorneys. The average net profits on sessions and assize prosecutions from Leeds during the last three years was only £1 3s. 8d. per case, including the important cases in which extra costs were allowed.

trates' clerk. Whether they should be his servants, or whether their appointment and removal should be in the discretion of the justices, is a question of detail not worth discussion here. We lean to the opinion that the clerk should have the absolute power to employ and discharge his subordinate officer, and be responsible for his acts. The other town districts would not require any additional clerk at all. At Doncaster or Wakefield, for example, there would be an average of between thirty and forty prosecutions a year. These would be distributed over four sessions and two assizes.\* The justices' clerk would be in possession of all the facts, and physical *indicia* presented upon the hearing of each charge before the petty sessions; and, in the great majority of cases, its management at the sessions or assizes would be merely mechanical. But at this point a practical difficulty presents itself. The prosecution of one criminal charge from a town district not large enough to support either a deputy or clerk for prosecutions, would involve the absence for several days of the justices' clerk himself from his duties. We think that this difficulty would be obviated by arranging the lesser town districts in circles of two or more. The cases should be got up, and the briefs prepared by the justices' clerk for each town; but the justices' clerk for each town should, in his turn, conduct the whole of the prosecutions within the circle to which he is attached, except in cases of importance. The very small town districts which have an average of not more than twenty prosecutions a year, should be included in the sessional divisions.

In dealing with the county sessional and smaller town districts, we are met by two practical difficulties. In the first place, the clerks of rural or small town districts are, as a rule, far less experienced in criminal law and practice than their brethren in the towns. In the second place, the number of prosecutions from each district would be so small, that the attendance of an officer from each district at sessions and assizes would be quite out of the question. We would sug-

\* In the particular cases given, there would also be a winter gaol delivery.

gest, that the justices' clerks for sessional divisions and small town districts should act as deputy-prosecutors for their divisions or districts, under the superintendence of a Crown attorney or county prosecutor, who should always be the justices' clerk to the magistrates for the assize town or his deputy. This official should have complete control over all the criminal prosecutions in the sessional divisions and small town districts. In cases of importance, the justices of any such division or district should have the power, through their clerk, to require his attendance at any examination before commitment. In all ordinary cases, the deputy prosecutor should, immediately after the commitment is made out, send copies of the deposition to the county prosecutor; and, thereupon, the management of the case should devolve upon him. He should have full authority to call for any further evidence that he may think necessary; and, for this purpose, it should be the duty of the deputy prosecutor to act under his directions. The discretion should also be allowed to him, which we have claimed for the borough prosecutor, of bringing a case again before the justices, after commitment, wherever he thinks that the prosecution should be dropped. The salaries of the justices' clerks, for these sessional divisions and districts, should be fixed upon the principle of commuting, for an additional salary, one-half of the attorney's fees; the other half being devoted to the payment of the county prosecutor. If, for instance, we take the North Riding of York, there were, in the county sessional divisions, ninety-seven prosecutions in the year ending 29th September, 1861,\* representing, at an average of £2 for each case, a fixed salary of £194. Of this sum, one-half, or £97, would be apportioned amongst the justices' clerks of sessional districts in the shape of additional salary; the remaining £97 would be added to the salary of the county prosecutor, who, in this instance, would be the clerk to the justices of York. This official would also be the public prosecutor for the borough, where there

\* Judicial Statistics, 1861, table 3, p. 12.

were, in the same year, twenty-three prosecutions, representing a fixed salary of £46. He would also receive a salary of £12 for conducting the Scarborough prosecutions, which amounted only to twelve; the clerk to the justices of Scarborough receiving an additional fixed salary of £12 per annum as deputy prosecutor. Upon this basis of commutation the justices' clerk at York would receive an additional salary of £155 for his new duties as county prosecutor for the North Riding. Such a salary would certainly not secure the exclusive services of an attorney engaged in a large private practice. But added to that of the clerk to the justices, it would command the attention of himself or an efficient deputy to the criminal business which it represents. This, we believe, would be the case with all the counties where the criminal business is small, and the salaries would not rise above £200 a year. In those counties which afford much criminal business, the salaries would be large enough to engage the services of men who hold a high position in the profession. For instance, if the public prosecutor for Liverpool acted for the South Lancashire district, his salary would be rather more than £2,000 a year. So, if the Leeds prosecutions were taken with the West Riding, they would afford a salary of nearly £1,000 a year. But in every case we think that it would be better, and in the end more economical, to fix the salaries of the county prosecutors on a liberal scale. The additional expense would be a merely fractional increase in the cost of prosecutions, while the presence of able and experienced officers in the capacity of Crown prosecutors would give new dignity, power, and efficiency to this branch of our legal administration. And this increased efficiency would create a saving which would far more than balance the difference between a bare and a liberal salary.

We have discussed this subject of Crown prosecutions in detail, because it involves the most important of all the reforms called for in our system of criminal procedure. We believe that its introduction has been retarded because no one

has been at the pains to deal with it practically ; and we have, therefore, endeavoured to show how the principle may be adapted to the existing system without disturbing its machinery, or adding to its working expenses.

We will only add a few words on one important moral effect which would be produced by the change we advocate. We believe that it would at once raise the character of the profession, and remove some of the worst elements that at present degrade its practice and lower its tone.

The detection of crime, the pursuit and apprehension of offenders, and the prosecution of them, are all equally the duty of the State, and form no legitimate part of the ordinary business of an attorney. The evidence given before the Select Committee showed plainly that the open field of criminal prosecutions is a nursery for low practitioners. It is work which is avoided by professional men of any standing, and is sought for only by attorneys of low caste. It is time we should be rid of a system which only helps to support a class of men who, if they have not ceased to be honest, have certainly ceased to be scrupulous, and do no credit to the profession.

There is, however, another class which claims a certain kind of vested interest in the prosecution of criminals. How would this change affect the Bar? It could certainly do no harm ; probably would do good. The only abuse to which it could lead would be that of favouritism. But the standing of the public prosecutors, the control of public opinion, and the well-known ability of the Bar itself to look after its own interests, would probably counteract any such tendency. The patronage would be vested in a body of men far better qualified to exercise it fitly and fairly than is the case at present. The county prosecutor, the town prosecutors, the justices' clerks for the smaller town divisions, and the justices' clerks for the county sessional divisions, would all have some influence in the selection. Their independent position would enable them to act without fear or favour. The weak and unjust system of "souping" would come to be discounten-

anced. Briefs would be distributed on something like a principle. And those men who attend circuit from mere vacancy of life, or love of change, or those who never should have aspired to the forum at all, would miss the undeserved guineas, and soon be missed from their accustomed seats. Here, too, in the higher as in the lower walk of the profession, the new system would serve a moral purpose. For here, too, the pettifogger and the low attorney are represented by men who have equally fallen from the high estate of their common profession; who, after a fashion, can seek for briefs as the former seek for prosecutions, and who violate the traditions of the Bar.

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#### ART. VI.—CONVEYANCING. BY LEWIS.

*Principles of Conveyancing, explained and illustrated by concise Precedents. With an Appendix on the effect of the Transfer of Land Act, in modifying and shortening Conveyances.* By HUBERT LEWIS, B.A., late Scholar of Emm. Coll. Camb., of the Middle Temple, Barrister-at-Law. London: Butterworths. Hodges, Smith, and Co., Dublin.

CAN anything interesting or attractive be said about Conveyancing? Can the nooks and corners of second and third floors in Lincoln's Inn speak so as to please and instruct? Nay, can they make themselves intelligible? Is Conveyancing an art or a craft—or is it a science, as some of its more enthusiastic votaries affirm it to be? It may not be easy to answer these questions; but the transcendent importance of a legal system that so really and practically deals with the rights and titles of property appeals not less to the instincts of the multitude than to the knowledge and experience of the lawyer; and it has a history—a history of learning, and



thought, and practice—that may be reckoned, not by days and months, and years, but by ages. Were we indeed to trace it to its origin, we should find it to be coeval with property itself; and scarcely any people or community could be shown to be so rude and barbarous as to be without certain established forms and ceremonies for the gift, bargain, or contract. Among the Romans it was customary to pronounce a set form of words, accompanied with the breaking of a rod or straw. The Scythians used to pierce the arms or fingers of each other, and then suck the blood from them. In Scotland, it is said anciently to have been the practice to lick and join thumbs; and it is not so very long since with ourselves that the evidence of particular boundaries was preserved by whipping schoolboys on the spot, they receiving a stated fee for the permitted castigation out of the parish funds. Such primitive simplicity ere long gave way to written forms, on which the legal world have so improved that verbosity and prolixity have become almost as ridiculous as the rather distinct than tasteful procedure noted above; while, however, it must be acknowledged that the more modern practice was the less intelligible of the two epochs. The mystery of Conveyancing, verbiage, indeed, has often and not unjustly been the theme of ridicule to satirists and of lamentation to philosophers. Jeremy Bentham used bitter words on the irritating subject, and indulged in a bilious onslaught on the “Company of Conveyancers,” and “the firm of *Eldon* and Co. ;” and he even was at pains to explain that the involution of prolixity might produce an evil effect on the intellectual calibre of the profession, by reason of the “danger of the draughtman’s mind losing itself in the mizmaze.” But when he tried his own hand at the business, our philosopher scarcely came up to the standard of neatness and sense, by reducing the form of a Conveyance to a schedule in numerals, with blanks to be filled up according to the facts of the transaction—although there is no saying what may be the case in the year of grace 1925, the period with which he synchronizes the adoption of his

form. On the other hand, it would be as impracticable to contend that the composition of legal instruments ought to be fashioned by literary rules as it would be to apply the test of an exact symmetry to the Conveyancer's legal learning.

There is, however, a Conveyancing literature, if we may use the delicate term in such a connexion. But as usually displayed, it is of the cold and ungenial sort, with little to encourage or animate the student. And it is this very repulsiveness of Conveyancing which, probably more than anything else, has kept back the system, making it all but impervious to law reform, and preventing its dark recesses from being illumined and opened up by the operation of modern principles. And yet our legal traditions are replete with evidences of its power. It has played a great part in the growth and authority of our jurisprudence, and the Statute of Uses is one of the many tributes to its resources.

It may, indeed, be questioned whether the great majority of works on Conveyancing are law books in the proper sense of the term. They are rather elaborated repertories of form, and stores of practice for the service of the initiated; and we had imagined that an elephant might as well attempt to dance with grace as for a Conveyancing author to write with elegance, or even with method. It was, therefore, with a rather languid curiosity that we took up Mr. Lewis's work with the view of glancing at its contents. But the preface arrested our attention, and the examination we have made of the whole treatise has given us, what may be called a new sensation, pleasure in the perusal of a work on Conveyancing. We have, indeed, read it with pleasure and profit, and we say at once that Mr. Lewis is entitled to the credit of having produced an extremely useful, and at the same time original, work. This will appear from a mere outline of his plan, which is very ably worked out. The manner in which his dissertations elucidate his subject is clear and practical, and his expositions, with the help of his precedents, have the best of all qualities in such a treatise, being eminently judicious

and substantial. In his preface, to be sure, Mr. Lewis does not say much when he informs us in his opening sentence that the work "was undertaken in order to supply something to bridge over the passage from the study of the law of real and personal property, to that of the application of its principles to the preparation and construction of conveyances," for that, of course, is what all such works undertake to do. He interests us more when he informs us that, for the benefit of the student,

"the author has prefaced a course of dissertations founded on and illustrated by a progressive series of precedents in conveyancing, arranged on a new division of the subject. He has laboured to omit from the forms all that is really unnecessary or useless ; and he has embraced in the dissertations explanatory remarks which commence with the most important part of the instrument, and in which, as well the reasons of the omission of any customary clauses or words, as the necessity or use of the forms adopted are attempted to be set out ; and generally, he has endeavoured to introduce the reader to the novelties and difficulties of the subject by degrees."

It is satisfactory to know, on Mr. Lewis's authority, that there is a growing tendency among Conveyancers to cultivate brevity, and this appears to be especially the case in the country ; provincial drafts being thus the *corpus vile* to be, in the fulness of time, operated upon for the benefit and calm enlightenment of Lincoln's Inn. Lest, however, it should be thought he was giving too great indulgence to the provincial taste for brevity, at the expense of useful learning, he observes :

"The endeavour, however, to trace out the origin, object, effect, and legitimate employment of various portions of the precedents in general use, and to clear away some of the many repetitions, useless clauses, and excessive verbiage now in vogue, rendered necessary, in some cases, discussions of somewhat recondite matters ; and the attempt to generalize the explanations, so that the reader might apply them wherever they have any pertinency, has occasionally still further increased the elaborate nature of the remarks."

He very wisely adds :

“But it may be doubted whether summaries, epitomes, and abridgments of the law, or mere exhibitions of its bearing on particular cases, without clear statements of the principles and reasons on which it is founded, serve any other purpose than to enable a student to pass an examination, and to beguile the young practitioner into the mistaken notion that he is master of a subject which he has only begun to understand. It is submitted that full explanations of matters which ought to be understood will be easier of comprehension and remembrance by those who are by nature qualified to undertake the practice of the law, than pithy definitions and and sharp-cut rules.”

Mr. Lewis asks for indulgence as “a pioneer in an almost untrodden path,” although he pays a tribute to the learning and genius of the late Mr. W. F. Cornish, who may still be remembered by many as a gifted and accomplished lawyer. Mr. Cornish died before he had attained his thirtieth year, having therefore, in a comparatively brief period, accumulated the learning and knowledge of legal business which his works so remarkably exhibit. Mr. Cornish was a large contributor to this Journal, and an obituary notice of him will be found in the *LAW MAGAZINE* of 1830 (vol. iv. p. 517). Mr. Lewis remarks that Mr. Cornish’s work on Purchase Deeds is the only one he is aware of which is in any manner kindred to his own; it, however, he says, relates to obsolete forms and to special transactions; and although excellent as far as it goes, does not go far enough in abridgment or explanation. An excellent edition of that work, by Mr. Horsey, was published in 1855, and we hope Mr. Lewis agrees with us in the opinion that Mr. Cornish’s book may still be consulted with advantage.

Mr. Lewis’s division of his subject is, 1st. Conveyance of the absolute interest in various subject-matters from one person to another, which are the simplest and most generic forms of transfer relating to subject-matters; 2nd. Transfer by way of creation of particular interests in the same several subject-

matters; 3rd. The transfers of such particular interests when created from one person to another; and 4th. Conveyances in which several owners of particular interests unite to convey their aggregate rights to another, or to distribute them afresh in a new manner among a new group of particular tenants. But of this division only the first and second parts have as yet been executed. They constitute the volume under review, and, as we fully anticipate the favourable reception the author desires, we hope in due time to receive the remaining portion of his undertaking.

We have not space for any lengthened review, but we commend to particular attention the Introductory Chapter, on the contents of a Conveyance and the order of considering them, which is not only learned but wise and sensible. Speaking of an indenture *inter partes*, and after enumerating the various clauses of such a deed, and remarking that the Conveyance itself is generally conveyed in but a few clauses, he says :

“Of these, the clauses from the testatum to the trusts inclusive are the most important. By them is the transfer effected, and the destination of the property declared. And if they be wrong, accuracy and skill in constructing the other clauses cannot always effectuate a proper conveyance. They are the *most independent* parts of the deed; and, in truth, upon them will depend in great measure the form and substance of the rest of the instrument. The student should, on these accounts, arrange and determine their form and contents first; and we shall, accordingly, in all cases, to assist him, and to avoid anticipation in our remarks, begin our examinations of the examples by commenting upon these parts.”

Chapter VII., on a new form of mortgage, deserves notice. The author gives it as an illustration of his own views, but he fears it may not prevail “over the proverbial inertia and jealousy of novelty begotten by the practice of the law.”

He describes this form

“As an attempt to effect a mortgage, such that the lands shall

revest in the mortgagor or his assigns, without the intervention of a reconveyance, or a simple repayment of the mortgage money, acknowledged by the parties entitled to it; and which yet shall afford the mortgagee all the security necessary for the recovery of his money, and enable the parties taking the mortgage debt alone to sell, and make good title to the purchaser."

In his Appendix he follows in the wake of Lord St. Leonards, by subjecting the Transfer of Land Act to a criticism which is not very favourable to the ready adoption of the machinery it provides, or rather professes to provide, for securing a good title.

Mr. Lewis's work is conceived in the right spirit. Although a learned and goodly volume, it may yet, with perfect propriety, be called a "handy book." It is, besides, a courageous attempt at legal improvement; and it is, perhaps, by works of such a character that law reform may be best accomplished.

## ART. VII.—CONVICT DISCIPLINE.—REPORT OF THE PENAL SERVITUDE COMMISSION.

*Reports of the Commissioners appointed to inquire into the Operation of the Acts (16 & 17 Vict. c. 99; and 20 & 21 Vict. c. 3), relating to Transportation and Penal Servitude.*

*Papers and Discussions on Punishment and Reformation: being the Transactions of the Third Department of the National Association for the Promotion of Social Science. London Meeting, 1862.*

*On the Treatment of Convicts in Ireland. By Four Visiting Justices of the Wakefield Prison.*

*Our Convict Systems. By the Rev. W. L. CLAY, M.A.*

*The Immunity of "Habitual Criminals."* By Captain Sir WALTER CROFTON.

*The Intermediate Prisons a Mistake.* By an Irish Prison Chaplain.

*Irish Fallacies and English Facts.* By Scrutator.

*The Transportation of Criminals: being a Report of a Discussion at a Special Meeting of the National Association for the Promotion of Social Science, held at Burlington House, on the 17th of February, 1863.*

*Society for Promoting the Amendment of the Law. Report of the Special Committee on Convict Discipline.*

THE public is liable to periodical panics on the subject of crime. Every now and then an apprehension arises that the evil and dangerous elements, which lie under the surface of modern society, will escape control, defy repression, and put an end to security. We are just emerging from one of these panics, of which the Blue Book, at the head of the long list of publications before us, is the latest result. The issue, on the 29th of December, 1862, of a Royal Commission, to inquire into the working of the Penal Servitude Acts, was announced in the midst of an eager public controversy on the merits of the English and Irish systems of convict discipline, as means of repressing and diminishing crime, which for the last two years has appeared to be alarmingly on the increase, both as regards the number of offences and their magnitude and daring. There followed a comparative lull in the controversy in expectation of the result of the inquiry, though from the constitution of the Commission it was generally expected to be anything but favourable to the Irish system.

On the 2nd of July, a column of the *Times* was devoted to what purported to be an account of the Report about to be given to the public. According to this account, the Irish system stood completely condemned. But it speedily became known that the statements there made were not to be depended on;

and in a few days the Report itself proved them to be utterly at variance with the truth. The unaccountable mis-statements contained in the article are the more to be regretted inasmuch as many who take an interest in such questions rely upon the leading journal for a faithful digest of a bulky Blue Book which they have not the time to read. And although, in the same journal, there has since appeared another statement of its contents which does not convey exactly the opposite conclusions, inasmuch as it quotes the summary of recommendations in the words of the Commissioners, it utterly fails to bring out the strong and emphatic approval of the leading principles of the Irish system which the Report pronounces. Before attempting to do this, in justice to the Report, which is very valuable, but which the *Times* characterizes, probably in self-justification, as "not worth reading," it may be useful to glance back at the previous state of the question.

At the meeting of the National Association for the Promotion of Social Science, in June, 1862, Sir Walter Crofton, and the late Sir Joshua Jebb put their respective systems of convict discipline to the test of a public discussion. The discussion thus opened was carried on without intermission up to the close of the year. A perfect storm of pamphlets was showered upon the public. *Facts and Fallacies* served equally for attack and defence—the facts of one party doing duty as the fallacies of another, and *vice versâ*. The press took up the subject, and, on the whole, treated it with great candour and ability. Most of the higher Reviews, including the *Westminster*, the *Edinburgh*, and the *Quarterly*, ranged themselves on the side of the Irish system. In short, no public question was ever more thoroughly sifted. But turning back to the Report of the Social Science discussion, though the amount of evidence has been overwhelming, nothing has been added to the arguments brought forward or the conclusions urged in the papers there published. It may appear a trespass upon public patience to recapitulate



the points in these arguments, but these papers afford a complete survey of both sides of the question, and that question one which is still to be decided.

The paper contributed by the late Sir Joshua Jebb gives a rapid sketch of the history of transportation, in order to show that the ticket of leave was first applied in the colonies, as part of his own system, to which he calls attention as having been "successfully carried out in Ireland." When transportation ceased, and the Amending Act of 1857 followed the original Penal Servitude Act of 1853, the following were the conditions inscribed on the licence, except that "will" stood in the place of "may," till its application was more than doubtful :

"1. This licence is liable to be revoked in case of misconduct.

"2. It *may* be revoked in the case of the holder of it being convicted of any new offence, unless the punishment for that offence extends beyond the term of his former sentence.

"But it is not necessary that the holder should be convicted of any new offence.

"If he associates with notoriously bad characters, and leads an idle and dissolute life, with no visible means of obtaining an honest livelihood, he will be liable to be re-committed to prison under his original sentence.

"3. If his licence is revoked, he *may* have to undergo the whole remaining portion of his original sentence."

Starting from this point, the whole matter may be put into the question, What entitles a convict to a ticket of leave ; and to what kind of treatment does a ticket of leave entitle a convict ? The difference between the rival systems lies in the answer to this question. "The systems are identical in theory and design," says Mr. Burt, echoing Sir Joshua Jebb. In both, the first stage is separate confinement ; the second, associated labour ; and the last, release under ticket of leave. Before this last, the Irish system introduces the intermediate stage of associated labour and comparative freedom ; and, finally, insists on the fulfilment of the conditions of release. But

the Rev. Mr. Clay points out most clearly the differences between the two systems, before their apparent divergence at the intermediate stage. Mr. Burt says, as against the Irish system, "it may be denoted 'The Reformatory Theory.' It is based upon the legislative principle, that criminals ought to be imprisoned to be reformed. It asks for sentences long enough to reform them; it allows that they may be set free when they are reformed; and, in its full development, it asks that they may be kept until their reformation is effected." But the theory of the English system is generally supposed to be the reformatory one. If not, what is it? It is certainly not the punitive theory, as the admirable articles on "Prison Life in Portland," which appeared in the *Times*, plainly proved. It is as clearly not the preventive one, as riots and mutiny within the prison, and re-convictions for renewed offences without, testify. And, after all, it is not a bad theory, provided it could be worked out, that converts as many rogues as possible into honest men, and turns the prison key upon the remainder who refuse to be so converted.

The Irish convict forfeits freedom to the full extent of his sentence; but from the moment when he enters his cell, a system begins by which comparative liberty can be gained.

The English convict, by complying with the routine of the prison, by simple abstinence from breaking its rules, is at once placed in the first class of the second stage, which entitles him to better food and more gratuity than if he had been "outrageous." The Irish convict gains, by good conduct, only the lowest of four classes, through all of which he must mount, with no other stimulus than the awakened desire for improvement, and the prospect of earlier liberation. There is no appeal to the appetite for good rations; and the increase of gratuity, from class to class, is only from 1*d.* to 9*d.* In England it begins in the first stage at 8*d.*, and in the second, at 1*s.* 3*d.*

In England it is held that a man is entitled to a ticket of leave, because he has passed a certain time in prison without

being as idle and unruly as he might have been. In Ireland, he is not entitled to the ticket till he has shown by every test which can be applied that he is fit for freedom. Sir Joshua Jebb has stated his belief, that an intermediate system would "demoralize English convicts." "It would be too great a risk to send them messages; they would run away." There is the risk, otherwise there could be no test, but the Irish convicts do not run away, or, if they do, they are brought back again, with consequences.

The last and greatest difference between the two systems consists in the enforcement of the conditions of the ticket of leave in the one, and their total neglect in the other. In Ireland, the principle that the offender has forfeited his freedom to the full term of his sentence, is effectively carried out by a system of police supervision. In England, a deduction is made from the sentence of the judge; and the prisoner, on his release, may wander whither he will unwatched and unrestrained; and, unless he thinks his ticket of leave may act as a sort of charm to preserve him from punishment, he will find it useless to carry with him that bit of waste paper. Thus, all trace of him is lost, unless chance should discover him at the criminal bar, even before the original term of his sentence is completed. Sir Walter Crofton tells us that the conditions attached to licences have been found most valuable, and their enforcement quite practicable. The supervision is a severe test of the liberated convict. He is free when he receives his licence to return to labour and to society, yet bound to live openly and honestly, on penalty of forfeiting that freedom to the full term of his sentence. He can at once be identified, and, if re-convicted, can be dealt with accordingly.

Sir Walter thus states the argument for supervision :

"I do not think it is well possible to exaggerate the importance of supervising the convict after his liberation; for if, on entering the prison, as in Ireland, he is properly instructed as to the course which will be pursued on his discharge, he will, from the difficulties

with which the commission of crime will be surrounded, be more inclined to co-operate with those who are endeavouring to amend him. It is obvious also, that by making the punishment of crime more certain, and by diminishing the possibilities of old offenders (through want of recognition) escaping with light sentences, we shall materially reduce the criminal class. I am entitled to speak strongly upon this subject, because I speak after many years' practical experience."

Another paper brings forward the difficulties which would attend the introduction of the Irish system into England, in which the following sentence occurs:—"For such ticket-of-leave men as openly obtruded themselves on the notice of the police, by entering on a course of crime or were reported for doing so, the fact being properly established, might be sufficient to warrant forfeiture of licence, even though no conviction had taken place." The chief difficulty stated is, that supervision is opposed to practice and public opinion. Mr. Burt concurs in thinking supervision desirable, but is afraid to intrust it to the police. If the lives and property of honest citizens are intrusted to them, it is difficult to see why they should not be intrusted with looking after felons still under sentence. It is a great and notable argument that the felons do not like the idea of it; but, strange to say, the argument is put forward as against and not in favour of the supervision. We were told the other day by the visiting justice of one of the county gaols of England, that he had to listen to the complaint of the surgeon against a sago diet. "Does it do the men harm?" asked the magistrate. He was obliged to confess that the men kept their condition tolerably; but then, "they did not like it." When the free working man sits down on a stone, in one of the Portland quarries, to eat his bread and cheese, while the convict drops his lazily wielded tools an hour earlier, to march back to prison and make a little toilet before he sits down in his cell to a capital warm dinner of soup and meat, &c., the argument does not seem to be so very inconsistent after all.

With regard to the results of the two systems the evidence is, of course, completely contradictory. There is, however, one thing brought out. Tested at Wakefield, the relapses under the English system, which, it must be remembered, professes to lose sight of the licence holders, were from 40 to 45 per cent.; while the highest number of re-convictions charged against the Irish system, and estimated by its opponents, is only 13 per cent., the Irish system taking special pains to ascertain and secure re-convictions.\*

On the evidence then before them, the Council of the National Association, on the 19th of February last, passed the following resolutions, which we give, in order to show how completely the conclusions arrived at by the Royal Commission agree with them, except on the question of transportation :

"1. That the failure of the present system of convict discipline in England is chiefly due to the short sentences frequently passed on habitual criminals, the want of an efficient probationary stage for convicts under sentence, and of police supervision over discharged prisoners.

"2. That these defects would be remedied by adopting and carrying out the principles of the convict system which has been so successfully administered in Ireland.

"3. That it is not desirable to attempt any return to the old system of transportation, which, apart from the opposition it would provoke from the colonies, would entail heavy and permanent expense on this country, without producing any adequate advantages, or any results which would not be better, as well as more cheaply, obtained by well-regulated convict establishments at home.

\* We are informed by the present sole Director, Captain Whitty, that the following is the true state of the case on this point:—

From 1856 to 1861 inclusive, 2,039 males have been discharged from intermediate prisons, and of these only 76 were sentenced to the convict prisons, being 3·72 per cent.

In the same period, 1,509 males were discharged from ordinary prisons; and of these 226 were re-sentenced, being 14·5 per cent.

The percentage of males from refugees, who have been re-sentenced, amounts to 6 per cent., nearly 23 out of 386.—*Observations on the Treatment of Convicts in Ireland: by four Visiting Justices of the West Riding Prison.*

"4. That at the same time it is most desirable to encourage the emigration of criminals sentenced to penal servitude, who shall have by steady industry and labour whilst in prison, or whilst under probation, saved sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select."

The Council of the Law Amendment Society also issued a report founded on a series of resolutions in all respects similar to those of the Social Science Council, of which we need quote only one as even more definite in its language than any of the latter.

"That the preliminary imprisonment should be made more severe ; that a system of marks should be established in the second stage of labour ; that intermediate prisons on the plan of Lusk and Smithfield should be organized, and that a strict supervision should be exercised over convicts discharged on tickets of leave, the conditions of which should be stringently enforced."

The conclusions of the Report with regard to the causes of the increase of crime, might be stated in the exact words of the first resolution of the Social Science Council. The Report states, "that a large percentage of those discharged from convict prisons are known to be re-convicted, while many more probably are so, but escape detection from the absence of any means of ascertaining the previous history of those convicted." The want of efficacy in the present system, according to the Report, is mainly attributable to the shortness of the punishment generally inflicted upon convicts, and in a minor degree to the defects in the discipline to which they are subject, and the want of any proper means of supervision of convicts released on ticket of leave ; in short, from too early release, and release under conditions which have never been enforced.

The Commissioners recommend :—

1. That convicts discharged on ticket of leave should be placed under the supervision of officers appointed for the purpose of enforcing the conditions of the licence ; and that

upon a licence holder being convicted of a very serious offence, the portion of his original sentence unexpired at the time of his second conviction should be undergone after the termination of the second sentence. They also recommend a longer sentence upon re-conviction, rejecting the suggestion that no remission should be allowed on a second conviction, which the Commissioners think would remove the "chief inducement to industry and good conduct while undergoing punishment."

2. That the shortest term of penal servitude should be seven years.

3. That the prisoners should earn a remission of their sentences by industry, recorded by marks, calculated daily by the amount of work done by each.

The Commissioners reiterate their conviction that "the hope of earning some remission of their punishment is the most powerful incentive to industry and good conduct which can be brought to bear upon the minds of prisoners." The making of that remission a right to be forfeited, instead of a reward to be hardly earned, wholly destroys the principle. This the Commissioners allow that the English system does; they also take exception to some of the regulations of the Irish system, but they pronounce it "a nearer approach to the best system." In point of fact, they go [further in the same direction, and make remission depend still more closely on the individual exertions of the convict.

4. That separate confinement should continue for not less than nine months, and be made of the same deterrent character as in Ireland, by means of lower diet, more monotonous labour, and no gratuities.

5. That the Irish plan of dividing the convicts into classes, according to their behaviour, should be adopted. "Some classes might be made more penal than others, in respect to diet or otherwise; others, on the contrary, being more assimilated in discipline to the advanced classes in the Public Works Prison in Ireland."

6. That corporal punishment, more severe than is allowed at present, be inflicted for prison offences, such as acts of violence against officers or fellow convicts.

7. That gratuities should be reduced, and that the period during which they can be earned should begin much later in the sentence.

8. That to obviate the difficulty of finding employment for discharged convicts in this country, all able-bodied male convicts, with certain specified exceptions of criminals deserving the utmost severity of the law, should be sent before the expiration of their sentences to Western Australia, to be there treated as in the Irish intermediate prisons, and released under supervision.

9. That those released on ticket of leave at home be placed under strict supervision.

There are many other minor recommendations, calculated to make the more important ones effective in the highest possible degree—such as schooling to be carried on after working hours; communications with free labourers on public works to be cut off, and gratuities to warders for work done by prisoners to be commuted for salary.

The Commissioners thus recapitulate :

“In order that our views may be more clearly understood, we beg, in conclusion, to state that we consider the following to be the most important of our recommendations :—

“1. That sentences of penal servitude should not in future be passed for shorter terms than seven years.

“2. That the principle, already recognised by the law, of subjecting re-convicted criminals to severer punishment, should be more fully acted on.

“3. That convicts sentenced to penal servitude should be subjected, in the first place, to nine months' separate imprisonment, and then to labour on public works for the remainder of the term for which they are sentenced, but with the power of earning, by industry and good conduct, an abridgment of this part of their punishment.

“4. That all male convicts, who are not disqualified for removal



to a colony, should be sent to Western Australia during the latter part of their punishment.

“5. That those who may be unfit to go there, but may earn an abridgment of their punishment, and who may consequently be discharged at home under licence, should be placed under strict supervision till the expiration of the terms for which they were sentenced, and that the necessary powers should be given by law for rendering this supervision effectual.”

From this Report three of the Commissioners dissent, and two of these withhold their signatures.\*

Mr. Henley refuses to sign because he is opposed to the principle of release on licence. Mr. Childers signs, agreeing generally with its recommendations, but protesting against the proposals as to transportation, because, in his opinion, the measures proposed, “while costly to this country and odious to her colonies, would at best afford a brief delay in the solution of a question daily becoming more difficult.”

With Mr. Childers' protest we most entirely agree. The cost to this country of sending out from 1,000 to 1,500 convicts yearly, of providing for them establishments and efficient superintendence during the portion of their sentence which it is proposed they should spend there in prison, previous to obtaining their licences, would be enormous. If the present demand for labour in the colony would, as stated, enable it to receive them, and if that demand is likely to increase as its resources become more developed, the natural result of such a demand would be and ought to be a free immigration. As a proof of the success attainable by one branch of industry in the colony, it is mentioned that a settler, who was only a labouring man in 1850, had lately sold his year's clip of wool for £1,000. Ought the convict to find such a field more open to him than the free labourer? If a considerable influx of free labour took place, Western Australia would follow the

\* The Report was signed by—

Grey.

Naas.

Cranworth.

E. P. Bouverie.

J. S. Pakington.

S. H. Walpole.

H. Waddington.

Russell Gurney.

O'Connor Don.

Hugh C. E. Childers.

example of our other colonies and reject the convicts altogether. But if the numbers to be sent out discouraged a free emigration, by supplying sufficient labour at the expense of the home government, the colony would be dependent on the increase of its criminal population for its growth and development. The state of society which would grow up in a colony to which 1,500 convicts were sent yearly may be imagined. It is also recommended that no female convicts should be sent out, but that Government should encourage a free female emigration in order to provide wives for the convicts yearly released. What class of women is it believed would take advantage of this brilliant scheme? It closes the colony to all women with any remnant of self-respect. They must have small hope of their country who think that its working women would not rather starve at home—the fate of a good many of them—than go abroad for such a purpose. It is well known what class of women fill our prisons. Assuredly no other class would emigrate on such terms. Are these the materials of which to make a nation? One of two things is inevitable: either Western Australia would become a mere penal settlement—with the criminal element so strong as to require constant and strong coercive repression—expensive, odious, and useless; or the free labour element will increase, and at last refuse to allow the criminal force to receive fresh accessions. This argument does not apply to the emigration of discharged prisoners who have given evidence of reformation tested by freedom under supervision at home. They would start as free men, and, having endured the full penalty of their offence, on equal terms with the free labourer. The gratuities they have earned in prison might go toward paying the expense of their emigration, so as to place them on an independent footing.

We have still to notice the chief dissenting memorandum attached to the Report—that of the Lord Chief Justice. It is of considerable length, and is, of course, entitled to great consideration. It begins by stating that penal servitude was

devised as a mode of punishment for offenders for whom imprisonment in ordinary prisons would have been inadequate. The discipline in these prisons is so severe that it cannot be inflicted beyond a certain limit, with a proper regard to humanity. Therefore, in order to increase the punishment, it became necessary to prolong the sentence; but, in doing so, it was also necessary to decrease the severity of the punishment. That from this cause penal servitude has lost its power to deter, the Lord Chief Justice concludes, after a very careful and judicial weighing of the argument, and all its balancing considerations; but he finds the weakness of the system "in the manner in which the punishment is inflicted, rather than in the periods to which it has been extended." Moderate labour, ample diet, substantial gratuities, with the remission of a fixed portion of the sentence, are hardly calculated, he adds, to produce on the mind of the criminal that salutary dread of the recurrence of the punishment which may be the means of deterring him, and, through his example, others from the commission of crime. He allows that this inherent insufficiency of deterrent power has been much aggravated by the want of supervision over discharged prisoners—a necessary part of the system he condemns. He lays down, that the principal value of punishment consists in its effects in deterring from crime; and that it is on the assumption that it will have this effect, that its infliction alone can be justified; "its proper and legitimate purpose being, not to avenge crime, but to prevent it." Assuming that it has this effect, the Lord Chief Justice argues in favour of greater severity and shorter terms of punishment, and against any remission whatever as weakening the effect of the judge's sentence, by introducing uncertainty. But if we do not grant the assumption, the argument falls to the ground; and is one which the whole course of modern thought and practical experience denies. We have given up the right to avenge; we no longer hold the power to deter. There is no punishment which the wise humanity of our time would

allow to be inflicted, powerful enough to deter the habitual criminal. The treatment of offenders has gradually become more lenient, and, notwithstanding the increase of population and wealth, crime has decreased. It is only the justice—the humanity — of a system of punishment which secures its enforcement. The lower the criminal is in the scale of humanity, the more inhuman would be the punishment required to deter him from crime. We repeat, any deterrent, in the shape of severity of punishment, which we hold in our hands, is powerless on the class for whom it would be required. The strong passions, the seared and blunted feelings of the man inured to crime, offer a resistance which mock at our humane severities. It is binding Samson with green withes, to treat a criminal to severities which must stop “short of inflicting bodily or mental injury.” But society holds in its hands far stronger powers for the repression of crime—the power to reform, and the power to incapacitate.

The working of both of these powers no longer rests on theory, but has received a practical illustration in the working of the Irish convict system; and it only requires the carrying out of the principles adopted in this Report, in the convict prisons of England, to at once secure and to prove their beneficent results.

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## Notices of New Books.

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[\* \* It should be understood that the Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**A Selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds : with Notes.** By Owen Davies Tudor, Barrister-at-Law. Second Edition. London : Butterworths. 1863. Pp. 1,014.

It is now fourteen years since the example of Smith's *Leading Cases* induced Mr. Tudor (in conjunction with Mr. White) to do for equity practitioners what that great work had effected for the common lawyers. The attempt was successful, and the leading cases in equity not only found favour at home, but were transplanted to American soil, where the work was edited by learned and eminent hands. Encouraged by this success, Mr. Tudor, some seven years since, collected and edited a number of leading cases, the knowledge of which is of the greatest importance to the real property lawyer and conveyancer ; and to these cases Notes were appended after the same method as that adopted in the *Leading Cases in Equity*. The second edition of this latter work is now before us, and we are able to say that the same extensive knowledge, and the same laborious industry, as have been exhibited by Mr. Tudor on former occasions, characterize this latter production of his legal authorship. We are informed in the advertisement to the edition that the Notes have been carefully revised, and much new matter added, the additions consisting of about 170 pages ; and it is hardly necessary to say, that the number of cases cited has been largely increased, and brought down to the latest period.

It should be noticed, that an entirely new case has been added to this edition, that of *Lord Braybroke v. Inskip*, in which the question is dealt with, when mortgage or trust estates will pass under a general devise. Seventeen pages of notes, careful and elaborate, are appended to the case, and constitute a valuable addition to the original work.

It would not be possible, nor would it be consistent with this brief notice, to enter into the details of this volume, which can only

be treated with justice in a lengthy article ; it is enough, at this moment, to reiterate our opinion that Mr. Tudor has well maintained the high legal reputation which his standard works have achieved in all countries where the English language is spoken, and the decisions of our Courts are quoted.

Jurisprudence. By Charles Spencer March Phillips. London : John Murray. 1863.

THIS is a clever attempt to construct a system of jurisprudence on the antiquated principle of natural justice. Although we cannot say that the attempt is at all successful, still we have no hesitation in pronouncing the work of Mr. Phillips to be one of great interest. Any treatise upon jurisprudence by an Englishman must naturally excite attention, from the rarity of such a performance ; and the present work is unquestionably distinguished by ability of no common character, by accurate and forcible modes of expression, and by considerable powers of systematic thinking and searching analysis. We do not, however, mean to assert that these qualities are entirely without alloy. There is a tendency to dogmatism and self-confidence which is neither pleasant, nor favourable to truth. On some occasions there is an amount of flippancy which strikes us as not quite suitable to the subject ; and considerable portions of the work are distinguished by an aridity which certainly equals anything we have ever come across in law or in any other department. As Mr. Phillips does not appear to be connected with the profession, we have no scruple in saying that he is by no means sound in his law. What authority has he for laying it down "that every man who publicly professes to exercise any art or trade for hire or profit is compellable to give assistance in all cases where it is required, and will be responsible for the consequences if he refuses to do so?"\* Or what does he mean by saying that "a body of associated individuals may appoint a corporation aggregate, and vest the supreme authority in a *corporation sole*, as in the case of a city whose inhabitants combine to elect a town-council, presided over by a mayor?"† We have detected various instances of a similar nature throughout the work ; and we deeply regret that such slips should occur, as they must inevitably shock the delicate susceptibilities of English lawyers, and prejudice them against a book which, we confess, we should like to see extensively read by the profession.

It is, of course, impossible for us on the present occasion to give any adequate idea of the contents and method of the work. The author defines jurisprudence as "the science which teaches us to analyse and classify the rules of justice," and excludes the idea "that jurisprudence teaches us, or can possibly teach us, what the rules of justice are." After an elaborate introduction, in which Mr. Phillips fully states the principles upon which he proceeds, he treats the subject under two great divisions: First, *Natural*

\* Sec. 48.

† Sec. 127.

Jurisprudence, embracing personal rights and obligations, real rights and obligations, and statual rights and obligations; and secondly, Civil Jurisprudence, embracing municipal rights and obligations, territorial rights and obligations, and extra-territorial rights and obligations. The following quotation will show the leading object of the work:—"I intend to try by the present treatise the experiment of presenting the science of jurisprudence to the student in its natural shape and order. For this purpose I shall first inquire from what inevitable circumstances the necessity for such a science has arisen. These circumstances, whatever they may be, will constitute the natural elements of the science, and by the various combinations of which they may be capable, the science chiefly, in its simplest and most elementary form, will be composed. The natural and everlasting foundation being thus laid, it will become comparatively easy to comprehend the effect of the various artificial superstructions which the will of man has erected, or may erect upon it. To investigate the details, or even to sketch the outlines of human legislation, is of course no part of my plan, but I shall endeavour to indicate the general principles by which it is connected with, and through which it may be said to form a part of, the universal science of jurisprudence. I believe that the result of this conception, if adequately worked out, will be a clear and comprehensive view of that great system of problems whose solution is the object of law. Every question of right which can possibly arise between two human beings would be stated in its proper succession and connexion, and a method of analysis would thus be provided by which any conceivable system of law might at once be arrayed in precise and perfect logical order."—P. 23. It will be seen at once from the above extract that Mr. Phillips is opposed alike to the utilitarian and to the historical theory of jurisprudence. We cannot, however, say that in formally discussing the question, he has thrown any real doubt on either of the two views, which with certain limitations may very well stand together. His own theory, we venture to think, he leaves very much where he found it. With respect to English law, we may observe that Mr. Phillips considers it capable, by the application of general principle, of becoming "the most perfect system of law whose existence the imperfections of the human intellect will permit." "Such a system," he says, "would consist in a code of fixed rules, founded upon rational calculations of general expediency; and combined with a collection of judicial precedents constantly improved by the additions and alterations of a succession of accomplished jurists."—P. 72.

*A New Pantomime.* By Edward Vaughan Kenealy, LL.D. London: Reeves & Turner. 1863.

It is so rare to find a barrister in successful practice who is also gifted with poetical genius, that such an event should not be passed over in a hurried notice. We had fully intended to do Dr. Kenealy justice in an article, but an unusual pressure on our space prevents

our fulfilling the intention. We should be unwilling, however, to allow this number to pass into print without expressing our conviction of the real genius which is embodied in the "New Pantomime."

*The Institutions of the English Government. Being an Account of the Constitution, Powers, and Procedure of its Legislative, Judicial, and Administrative Departments.* By Homersham Cox, M.A., Barrister-at-Law. London: H. Sweet. 1863. Pp. 757.

*The English Constitution.* By Dr. Edward Fischel. Translated from the Second German Edition. By Richard Jenery Shee, of the Inner Temple. London: Bosworth & Harrison. 1863. Pp. 592.

As we hope to treat of these two works at some length in a future number, we shall confine ourselves at the present moment to a short statement of the nature and objects of each.

Mr. Homersham Cox has collected from ancient and modern authorities a general account of the British Government, of the powers and practice of its several departments, and of the constitutional principles affecting them, in a compendious form. The work supplies a great want in describing the modern functions of British institutions. Copious and authentic authorities are cited in the notes, and the volume opens with an excellent and most useful analysis.

Dr. Fischel's work is perhaps still more valuable as being the independent opinion of a foreigner on the British Constitution, and the institutions which have grown up and flourish under it. It is wonderful that a foreigner should have obtained a knowledge of these at once so extensive and minute as that which this work exhibits. The translation is made from the second edition of the work, and is substantially literal, though some errors have been corrected by the translator, Mr. R. T. Shee.

*Questions for Law Students on the Fifth Edition of Mr. Serjeant Stephen's New Commentaries on the Law of England.* By James Stephen, Esq., LL.D., &c. London: Butterworths. 1863.

WE have recently noticed the new edition of Stephen's Commentaries with that approval which is unanimously accorded by the voice of the profession. The work now before us contains a series of questions on the Commentaries, for the use of Law Students. It is, in our judgment, carefully and ably done.



**The Transfer of Land and Declaration of Title Acts, 1862 :** with Notes, General Orders, Forms, &c.; and a full Index. By R. Denny Umlin and Thomas Key, Esqrs., Barristers-at-Law. London: William Maxwell. 1863.

**Shall we Register Title? or the Objections to Land and Title Registry Stated and Answered.** By Tenison Edwards, Esq., Barrister-at-Law. London: Chapman & Hall. 1863.

It appears from a Parliamentary Paper, ordered in June last, that the number of applications as yet made to the Office of Land Registry is thirty-four, comprising property estimated to exceed £500,000 in value; but only three land certificates have been granted. Nothing has yet been done under the Declaration of Title Act. It is, therefore, still open to theoretical conjecture, how far the recent measures on land transfer are likely to succeed, and the little works of Messrs. Umlin and Key, and Mr. Edwards, may be consulted with advantage on the probable solution of the question. The former, we may say, contains a very good account of the Irish and the South Australian systems, which is a valuable contribution to (if we may use the term) the comparative jurisprudence of the subject. Mr. Edwards gives in a popular way a very clear statement of the objections which have been urged to the registration of title, and the answers that may be made to such objections. Both the books are worth reading.

**A Concise Treatise on the Construction of Wills.** By Francis Vaughan Hawkins, M.A., Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. London: William Maxwell, Bell Yard, Lincoln's Inn. 1863.

THIS is a synopsis of those judicial decisions which are now the canons of interpretation applicable to wills. Lawyers are much indebted to parish clerks, schoolmasters, and other self-instituted will-makers, for the subtleties of this department of our jurisprudence. Some of the most ingenious arguments and memorable judgments reported in the books are those which settle the legal construction to be put on testamentary words and phrases. Thus, such expressions as "issue," "heirs male of the body," "money," "effects," "lands," "rents and profits," "estate," &c., which constantly occur in wills, have a precise legal meaning, according to which the document will be construed, unless the testator expressly prescribes a different interpretation. The author confines himself to the Rules of Construction; and, in this respect, his treatise differs from the larger work of Jarman, which embraces, in addition, the Rules of Law. The distinction is clear, and deserves attention. "A rule of construction always contains the

saving clause," unless a contrary intention appear by the will; though some rules are much stronger than others, and require a greater force of intention in the context to control them. "On the other hand, a rule of law is not a rule of construction (as the rule in Shelley's case, the rules as to perpetuity, mortmain, lapse, &c.); acts independently of intention, and applies to dispositions of property in whatever form of words expressed. This distinction is fundamental, and lies at the root of the subject." The enigmatical intentions of testators are construed according to the general rules which from time to time have been laid down by the judges. Mr. Hawkins has bestowed much labour in collecting them together from the reported cases, and in illustrating their application. To give some idea of the manner in which the author deals with the subject, we give the following analysis of the Chapter on Residuary Bequests and Devises :—

"Rule.—A general residuary bequest carries lapsed and void legacies." (This rule is explained by brief extracts from four leading cases, *Leake v. Robinson*, 2 Mer. 393, &c.)

"Rule.—A general residuary bequest, contingent on terms, carries the intermediate income which is not undisposed of, but accumulates." (*Trevanian v. Vivian*, 2 Ves. sen. 430.)

"Rule.—In wills made or republished on or after Jan. 1, 1838, real estates comprised in devises which fail or are void, passes under the residuary devise in the will, unless an intention appears to the contrary." (Illustrated by several cases.)

"Rule.—A gift of the testator's residuary *real* and *personal estate* (blending, though contingent in terms), carries the intermediate rents and profits of the real estate, as well as the income of the personal estate. (*Stephens v. Stephens*, Forest, 228; *Genery v. Fitzgerald*, Jac. 468, &c.) Thus, if the real and personal estate be given to an unborn person, the rents and profits of the real estate do not descend to the heir till the birth of the person entitled, but accumulate."

Every chapter bears evidence of discrimination and good judgment. There is no surplusage. From the nature of the materials, being chiefly isolated judgments, the chapters are necessarily more or less disconnected. A certain want of congruity is perhaps unavoidable in a system of construction elaborated by a succession of judges, some inclining rather to the grammatical or literal, others to the logical or inferential interpretation of testamentary instruments. Those who have not got the last edition of "*Jarman on Wills*," will find this volume, as regards rules of construction, a very excellent substitute.

## Events of the Quarter.

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**ALMOST** the only event in the Parliamentary Session which can be called interesting or important in a legal point of view, is the passing of the Statute Law Revision Bill, and the remarkable speech of Lord Chancellor Westbury on that measure. This speech has been published (edited by Mr. Macqueen), and is not only a lucid exposition of the need for the revision of our law, statute and unwritten, but, what is far more important, it shows *how* the great work may be done, and is an earnest that it *will* be done.

The seventh annual meeting of the National Association for the Promotion of Social Science will commence at Edinburgh on the 7th of October, and continue for one week. Lord Brougham is the President; Lord Curriehill takes the chair of the Jurisprudence Department, and will, we are informed, address the Association on the transfer of land. Professor Muirhead and Mr. Campbell Smith are the Local Secretaries for the Department.

Some time since we stated that a movement had been commenced at Berlin to found an institute in memory of the illustrious Savigny, which had already received support in various countries of the Continent. Since the publication of our last number a corresponding committee has been formed in London, under the presidency of Lord Brougham, and with the view of drawing attention to its objects, we insert at length the minutes of its first meeting:—

At a meeting held at 3, Waterloo Place, Pall Mall, on Wednesday, the 17th of June, 1863, present the Right Honourable Lord Brougham in the chair, letters were read from Sir F. H. Goldsmid, Bart., Q.C., M.P., Charles Austin, Esq., Q.C., Professor Cairns, W. Forsyth, Esq., Q.C., M. D. Hill, Esq., Q.C., Professor Muirhead, expressing their approval of the objects of the meeting.

It was moved by Sir Erskine Perry, and resolved unanimously—

That a committee be now formed in aid of the Fund of the Savigny Institute, and that such committee consist of the following gentlemen, with power to add to their number:—

Lord Brougham, Lord Neaves, Lord Mackenzie, Sir F. H. Goldsmid, Bart., M.P., Sir Fitzroy Kelly, M.P., Sir Erskine Perry, Sir Robert Phillimore, Mr. M. D. Hill, Q.C., Mr. Charles Austin, Q.C., Mr. Forsyth, Q.C., Mr. Thos. Webster, F.R.S., Mr. Joseph Parkes, Mr. G. W. Hastings, Mr. Westlake, and Mr. Wendt.

It was moved by Mr. E. E. Wendt, and resolved unanimously—

That Lord Brougham be requested to act as chairman, and

Mr. G. W. Hastings and Mr. Westlake as honorary secretaries to the committee.

Mr. Wendt made the following financial statement of the Savigny Fund :—

£2,849 5s. have been subscribed and paid in to the present time ; £2,445 were invested on 12th February, 1863, in Pomeranian Provincial Bonds, bearing 4 per cent. interest.

The three academies have consented to act under the statutes.

The executors of Savigny have assigned to the institute the whole copyright in Savigny's works.

The subscriptions have been received from almost every country of Europe ; the King of Portugal has given £40.

It was moved by Mr. Westlake, seconded by Sir Erskine Perry, and resolved unanimously—

That in order to secure the practical and efficient working of this committee, it is resolved as follows :—

1. That the gentlemen who have kindly undertaken to act as honorary secretaries to this committee, viz., G. W. Hastings, Esq., and John Westlake, Esq., are hereby authorized to issue an appeal to the public through the daily press and such periodicals as they may think fit, stating this day's proceedings, and inviting all those who take an interest in the works of the illustrious Savigny to testify the same by liberal contributions.

2. That E. E. Wendt, Esq., is hereby authorized to act as treasurer to this committee, to cause the amounts received in favour of this institute to be paid in at the bank of Sir Charles Price, Bart., Maryat and Price, to the credit of an account to be opened there under the title, Committee of Savigny Institute ;

3. That the cheques to be drawn against any balance of this account must bear the signatures of the treasurer and two members of this committee ;

4. That the subscriptions received—less the expenses of this committee, to be defrayed out of the same—are to be held at the disposal of the council of the Savigny Institute in Berlin, and are to be applied in conformity with their statutes as sanctioned by H. M. the King of Prussia.

5. That this committee hereby delegates the authority for auditing the account of the treasurer to their following members, viz., Sir Fitzroy Kelly, M.P., Sir Erskine Perry, and Sir Robert Phillimore.

The Law Amendment Society has held its twentieth anniversary, and from the report presented on the occasion we make the following extracts :—

*“Law-Reporting.”*—The important subject of our law reports has, during the present session, again engaged the attention of this Society. The subject of law-reporting was originally brought before the Society by Mr. Alexander Pulling, fourteen years ago. The many evils and inconsistencies of the existing practice of recording and making public those decisions of our courts which serve as precedents in the administration of the law, are pointed out

in two able reports of committees of this Society in 1849 and 1853; and in these papers are contained some valuable suggestions for an amended system of promulgating the law expounded in Westminster Hall. At a meeting of the Society held on the 2nd March last, Mr. C. F. Trower moved the following resolutions:—

“1. That it is highly expedient that the reported decisions of our superior courts of law in England and Ireland, from the earliest to the present time, should be forthwith expurgated and consolidated, and their undue accumulation for the future be, if possible, prevented.

“2. That to this end a Royal Commission should issue to inquire and report what are the best means of effecting such expurgation and consolidation, and of preventing such an accumulation, and generally, of improving the present system of law-reporting.

“3. That a deputation of this Society do forthwith wait on the Lord Chancellor, the Chancellor of the Exchequer, and the Home Secretary, to lay the views of this Society before them, and urge upon them the immediate adoption of these resolutions.

“The meeting, approving of the principle of the resolutions moved by Mr. Trower, referred the same to a committee to report to the next meeting, as to the best mode of proceeding thereon. The committee so appointed recommended that a deputation should wait on the Lord Chancellor in reference thereto; and this recommendation having been sanctioned at the next meeting of the Society, a deputation was duly formed, and had the honour of two interviews with the Lord Chancellor on the subject. They explained to his lordship the views adopted by the Society, and asked the aid of his lordship in carrying them out. An able pamphlet, subsequently published by Mr. Daniel, Q.C., contains some practical suggestions for an amendment of our law-reporting system. The masterly exposition of the whole subject by the Lord Chancellor in the House of Lords, on the 12th June inst., in connexion with his lordship's plan for a consolidation of the law, is yet fresh in the public mind. The proposal for an immediate official inquiry into the subject of our law reports, gives to the Society sanguine hopes that at no very distant period our present practice of law-reporting may give way to a system under which the law laid down by judicial decisions may be communicated to the public in a form equally authentic with that prescribed by the legislature.”

“*Suitors' Conciliation Bill.*—Lord Brougham, in the memorable speech of 1828, on Law Reform, animadverted upon the great expense to which litigants were subjected, and recommended the adoption of Courts of Reconcilement for the cheap settlement of disputes. Since that time his lordship has repeatedly invited the attention of Parliament to the subject, and the Bill of the present session is the last of a series of efforts to carry a measure upon which this Society has long ago pronounced a favourable opinion. While the more difficult questions of law and fact will always find their way to the higher tribunals, notwithstanding the unavoidable expense attending such proceedings, there remains a large class of

cases where law and fact are simple, and where both might be disposed of satisfactorily without the expensive aid of an elaborate judicial inquiry. The third section contains the pith of the Bill. It enacts that it shall be lawful for the judge of any County Court to sit in chambers at any place within the district of the court, for the purpose of deciding any disputes, or arranging any difference that may have arisen between persons willing to refer their disputes to his amicable decision; and on hearing such persons and other witnesses, if any, summarily and finally to decide the matter of dispute, or refrain from adjudicating on the same, as to him might seem fit."

On Saturday, the 4th of July, the annual dinner of the Society took place at Greenwich, with more than usual success. Lord Brougham, in proposing as a toast, "the Amendment of the Law," said, he was old enough to remember the time when, if a person spoke of amending the law he would be called a destructive. Though there were many good things in our law, there were also many defects. It was gratifying to him to have lived to see so many solid practical improvements in the law itself, as well as in the administration of it. He was sorry to say that the session now approaching its close was almost a blank as far as regarded any measures of legal improvement. Within the last twelve months, however, the initiative had been taken of a substantial reform; he alluded to the great project of courts of reconciliation or conciliation, which he thought had now a fair chance of being ultimately realized. In his opinion it would be wise to make such a measure voluntary in the first instance, believing that when its advantages were felt it would in effect become compulsory. Another proposed improvement was the extension of the law which allowed the evidence of the principals in civil cases to criminal proceedings as well. He would not, however, advocate a compulsory examination, as in France, where a system of mental torture was sometimes resorted to in order to compel the accused either to confess or forswear himself; but he would desire to see our criminal law so amended that in the event of the defendant voluntarily presenting himself for examination in public court, his evidence should be received. This amendment of our criminal law had been strongly advocated by Jeremy Bentham, Sir Samuel Romilly, and Lord Chief Justice Denman. He congratulated the Society upon the extension of their principles into France, Belgium, and Holland, and also on the success which had attended the literary department connected with the amendment of the law during the last twelve months, referring in terms of commendation to a work on the Discipline of the Bar, by Mr. Lefevre; also to another work by Mr. Phillips, upon Jurisprudence. But of all those works, the most agreeable and valuable was Mrs. Austin's progress in the completion of the invaluable work of Mr. John Austin. The noble Lord next called attention to the valuable measure amending the law relating to the transfer of land which had been devised and carried into law in the colony of South Australia, and had subsequently been adopted in the other

Australian colonies, which measure afforded the solution of the great difficulties which the Legislature of this country had so long been struggling to overcome in amending this important branch of the law. He regarded it as the greatest practical reform of the day and congratulated the Society on having the author of that system, Mr. Torrens, amongst its members present on that occasion. There had been a report sent in by the Commission on the Execution of the Criminal Law, and from all he had heard he was very much grieved to say that he did not think it would in all respects prove satisfactory. The noble Lord concluded by giving "The Amendment of the Law."

After several other toasts had been given and responded to, the noble Chairman, in proposing the concluding toast, "Colonial Justice," bore testimony to the wisdom and sound legal knowledge of the colonial judges generally, as exhibited in their decisions which had come under his cognisance as a member of the Judicial Committee of the House of Lords, and coupled with the toast the name of Mr. Torrens, to whose labours, as he had before remarked, jurists, both in the mother country and the colonies, were so much indebted.

Mr. Torrens, after acknowledging the compliment paid to himself, returned thanks on behalf of the colonial judges, who, he believed as a body, well deserved the eulogies that had been bestowed upon them by the high authority of the venerable president. There were several legal questions of great interest, involving affairs of the mother country conjointly with those of the colonies, which he hoped would become the subject of discussion during the next session of the Society. He referred to the want of reciprocity in the bankruptcy and insolvency laws as inflicting much injustice on colonial creditors. With reference to the remarks of the president upon the report of the "Penal Servitude Commission," he gathered from the article which appeared in the *Times* that morning, that transportation was to be resumed, and that Western Australia was recommended as a receptacle capable of absorbing all the convicts from this country. At that hour he would not go into the merits of this question as to deterring punishment, but, as representing the Australian colonies on that question, he must raise his voice in protest against this conclusion. It had been asked, what right had they to interfere while Western Australia was willing to receive convicts? He replied, the same right which an Englishman would have were his neighbour to post a notice on the land adjoining his dwelling—"Filth and night soil may be shot here." There was a moral atmosphere as well as a political atmosphere; and you had no more right to pollute the one than to pollute the other. A shipment of some forty conditionally pardoned felons had recently been made from Swan River to Sydney, and one of them taken in charge for drunkenness, was found to have concealed a complete set of pick-lock tools. Their properties and lives would be imperilled, their police and judicial expenses largely increased, by the proposed resumption of transportation, and therefore they had a right to pro-

test. They had passed an Act in South Australia making it penal in the captain of a ship to land in the colony any conditionally pardoned criminal, and rendering such criminal liable to be imprisoned and shipped back whence he came by the first opportunity. This Act might be declared *ultra vires*, as repugnant to British law ; but the colonists were determined to uphold it, and the position was calculated to induce collision between the Legislature and the Bench, than which nothing could be more disastrous. Her Majesty had no more loyal subjects than the Australian colonists ; even the colonial born, when they speak of visiting England, say, " We are going home." They had shown their loyalty by pouring out their wealth to relieve distress and famine in the mother country, and in contributing largely to every national testimonial, whether to commemorate those who fell in defence of the empire, or the memory of a revered Prince, and this was an evil requital, and would be received in Australia as the grossest insult. He begged to be excused if, as a colonist, he spoke warmly on the subject ; but he yet hoped her Majesty's Ministers would consider well before they took a step which would alienate the affections of a million and a quarter of her Majesty's loyal subjects in Australia.

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#### APPOINTMENTS.

Mr. R. Vaughan Williams, of Lincoln's Inn, has been appointed Judge of the County Court, district of Flintshire (Circuit No. 29), in the room of the late Mr. E. L. Richards, deceased.

Mr. Edward James, Q.C., has been appointed Attorney-General for the County Palatine of Lancaster, in the room of Mr. Bliss, Q.C., resigned.

Mr. C. H. Keene, of the Equity Bar, has been appointed a Registrar of the Court of Bankruptcy, in the room of Mr. Vizard, resigned.

Mr. George Loch, of the Middle Temple, has been appointed one of Her Majesty's Counsel.

Mr. James Sharp, jun. (of the firm of Sharp, Harrison, and Sharp, Southampton), has been appointed Treasurer of the County Courts of Hants and Sussex.

IRELAND.—Mr. W. O'Connor Morris has been appointed Assistant Crown Prosecutor for the King's County ; and Mr. G. W. Abraham Assistant Crown Prosecutor for Meath.

AFRICA.—Mr. T. L. Ingram has been appointed Her Majesty's Advocate and Police Magistrate at the Gambia.

Mr. J. C. Choppin, of the St. Vincent Bar, has been appointed Attorney-General for the island of St. Vincent.

Mr. Horatio James Huggins has been appointed Queen's Advocate for the colony of Sierra Leone.



**CANADA.**—Mr. John Sandford Macdonald has been appointed Attorney General, and Mr. Lewis Wallbridge, Solicitor-General, for Upper Canada ; and Mr. A. A. Dixon, Attorney-General for Lower Canada.

**FALKLAND ISLANDS.**—Mr. E. R. Griffiths, of the Common Law Bar, has been appointed Stipendiary Magistrate for the Falkland Islands.

**INDIA.**—Mr. F. D. Faithfull, of the firm of Faithfull and Keir, Solicitors, High Court, Bombay, has been appointed Judge of the new Small Cause Court, at Bilgaum. Mr. A. Hope, Civil and Sessions Judge of Hooghley. Mr. E. Jackson, Judge of the High Court of Judicature at Fort William, in Bengal. Mr. R. B. Swinton, Civil and Sessions Judge of Negapatam, Madras Presidency. Mr. A. St. J. Richardson, Judge and Sessions Judge of Ahmednuggur. Mr. R. F. Mactier, Judge and Sessions Judge of Satara. Mr. C. Forbes, Judge and Session Judge of Khandeish. Mr. Walter, Senior Assistant Judge and Session Judge of the Concan, for the detached station of Rutnagherry. The Hon. G. A. Hobart, Judge and Session Judge of Sholapore. Mr. C. Gonne, Judge and Session Judge of Tanna.

Mr. W. T. Tucker, Additional Judge at Tirhoot, Sarun, and Shahabad. Mr. R. B. Chapman, Magistrate and Collector at Pubna. Mr. R. Hankey, Joint Magistrate and Deputy Collector of Moorshehabad. Mr. J. W. Dalrymple, Civil and Sessions Judge at Bhaugulpore. The Hon. H. B. Devereux, Civil and Sessions Judge of Purneah. Mr. F. G. Millett, Magistrate and Collector of Tipperah. Mr. J. S. Armstrong, Joint Magistrate and Deputy Collector of Tipperah. Mr. F. M. Lind, Commissioner of the Allahabad Division. Mr. M. B. Thornhill, Civil and Sessions Judge of Furruckabad. Mr. H. B. Henderson, Judge of Jounpore. Mr. A. Monckton, Magistrate and Collector at Cawnpore. Mr. M. J. Walhouse, Civil and Sessions Judge of Mangalore, on the retirement of Mr. Chatfield. Mr. W. Stokes, Administrator General of Madras. Mr. J. Graham, Standing Counsel to the Government of India, to officiate as Advocate General at Bengal. Mr. W. C. Plowden, Joint Magistrate and Deputy Collector of the first grade at Ghazepore. Mr. J. Chesson, Subordinate Magistrate of the second class in the district of Sattara. Mr. T. H. Thornton, First Class Judge at Lahore, Captain C. A. MacMahon, First Class Judge at Umritsur. Mr. L. Berkeley, Second Class Judge at Delhi. Mr. J. C. Murphy, Second Class Judge at Simla. Mr. J. H. Penn, Third Class Judge at Jullundhur. Mr. G. C. Westropp, Third Class Judge at Hoshiarpore. Mr. F. R. Scarlett, Third Class Judge at Peshawur. Major F. L. Mayniac, Judge of the Small Cause Court at Nagpore. Hon. R. S. Ellis, C.B., Collector and Magistrate of the Madras District. Mr. G. Banbury, Sub-Collector and Joint Magistrate of the Madras District. Mr. H. M. S. Græme, Sub-Collector and Joint Magistrate of South Arcot. Mr. R. W. Barlow, Sub-Collector and Joint Magistrate of North Arcot.

Mr. Roberts, C.B., Judicial Commissioner of the Punjab, has been appointed to act as Judge of the Bengal High Court, in the place of Mr. Loch, who is absent on leave.

Mr. Holloway, of the Madras Civil Service, has been appointed a Puisne Judge of the High Court at Madras.

Mr. A. B. Warden, of the Bombay Civil Service, has been appointed Judge of the High Court, in the room of the Hon. H. Herbert.

Mr. H. S. Maine, LL.D., Member of the Legal Council of India, has been appointed Vice-Chancellor of the Calcutta University.

Mr. R. Westropp, of the Bombay Bar, Member of the Legislative Council of Bombay.

ST. HELENA.—Mr. William R. Phelps has been appointed Chief Justice of the Supreme Court of the Island.

## CALLS TO THE BAR.

### *Easter Term.*

INNER TEMPLE.—William Bennett Player Brigstocke, Esq.; Thomas Benyon Ferguson, Esq.; William Henry Milligan, Esq.; John Alfred Hudson, Esq.; James Edouard Ferdinand Poulin, Esq.; Francis Ashton Drake, Esq.; Samuel Sanders, Esq.; Percy Arden, Esq.; Charles Skidmore, Esq.; Arthur Richard Jelf, Esq.; Henry Offley Bright, Esq.; John Martyr Ward, Esq.; Charles James Jenkins Hannay, Esq.; Matthew Henry Starling, Esq.; and Ernest Algernon Sparks, Esq.

MIDDLE TEMPLE.—Henry Cecil Raikes, Esq.; Henry Thomas Wrenfordsley, Esq.; Charles Lovell Lovell, Esq.; and Richard Banner Oakeley, Esq.

LINCOLN'S INN.—George Edmund Wicksted, Esq.; Richard Dickson Preston, Esq.; Edward St. Aubyn, jun., Esq.; Stephen Blount, Esq.; Albert Glenie Perring, Esq.; Thomas Pitts Langmead, Esq.; and Stephen Ellis Rogers, Esq.

GRAY'S INN.—Nugent Charles Walsh, Esq.

### *Trinity Term.*

INNER TEMPLE.—Frederick Albert Bosanquet, Esq. (Certificate of Honour, First Class); William de Burgh, Esq.; Algernon Thos. Lempriere, Esq.; Henry Crompton, Esq.; Jacobus Petrus de Wet, Esq.; Arthur Moseley Channell, Esq.; Edwin Brooke Cely Trevilian, Esq.; William Henry Alexander, Esq.; Charles Bathurst, Esq.; the Honourable Douglas Edward Holroyd; Francis Thomas Egerton Prothero, Esq.; Duncan Darroch, Esq.; George Macfarlan, Esq.; Drummond Smith, Esq.; Charles Garth Colleton Rennie, Esq.; Charles Forbes Hodson Shaw, Esq.; Henry Worms, Esq.; Gwilym Williams, Esq.; John Thomas Crossley, Esq.; Robert Augustus Bayford, Esq.; John Cameron Ross, Esq.; George Godfrey Farrant, Esq.; and William Laurence Mackenzie, Esq.

MIDDLE TEMPLE.—James Lynam Molloy, Esq.; William Conrad

Reeves, Esq. ; William Primrose Mills, Esq. ; Lionel Browne, Esq. ; Leonard Harper, Esq. ; Henry Edmund Cartwright, Esq. ; William Frederick Haynes Smith, Esq. ; Francis Peter Labilliere, Esq. ; Charles Frederick Collier, Esq. ; and William Newton, Esq.

LINCOLN'S INN.—Charles Frederick Bockett, Esq. (Certificate of Honour, First Class) ; Robert Tennent, Esq. ; the Hon. Evelyn Melbourne Ashley ; Walter Molesworth St. Aubyn, Esq. ; John Gregory Watkins, jun., Esq. ; Robert Jasper More, Esq. ; Herbert George Henry Norman, Esq. ; Thomas Willert Beale, Esq. ; Charles John Hampden, Esq. ; George Miller, Esq. ; John Eden Duncombe Shafto, Esq. ; Dudley Zamoiski Beaumont, Esq. ; William Thirlwall Bayne, Esq. ; Mackertich Stephen, Esq. ; Peter Stevenson Davis, Esq. ; William Baillie Skene, Esq. ; Henry Jenkyns, Esq. ; George Alfred Paley, Esq. ; Joseph Knight, jun., Esq. ; Montague William Lowry Corry, Esq. ; Swinton Henry Boulton, Esq. ; and Alfred Lorenz Driberg, Esq.

GRAY'S INN.—William Bush Cooper, Esq. ; Arthur Pigou, Esq. ; and Robert Carr Woods, Esq.

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### BAR EXAMINATIONS.

At the public examination of students of the Inns of Court, held at Lincoln's Inn Hall, on the 19th, 20th, and 21st June last, the Council of Legal Education awarded to Mr. John Munro, student of the Inner Temple, a studentship of fifty guineas per annum, for a period of three years ; to Mr. Frederick Albert Bosanquet, student of the Inner Temple, and Mr. William Charles Druce, student of Lincoln's Inn, certificates of honour of the first class ; to Mr. William De Burgh, Mr. John Kennaway, Mr. Duncan Darroch, Mr. R. A. Bayford, Mr. Henry Stewart Reid, Mr. Maurice Powell, Mr. Henry Crompton, Mr. George Macfarlane, Mr. F. E. Prothero, and Mr. Henry S. Syres, students of the Inner Temple ; Mr. W. B. Skene, Mr. W. H. Weldon, Mr. Walter B. Renshaw, Mr. M. W. L. Corry, and Mr. J. Gregory Watkins, students of Lincoln's Inn ; and Mr. W. F. Phillpotts and Mr. James Molloy, students of the Middle Temple, certificates that they have satisfactorily passed a public examination.

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### EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

#### *Easter and Trinity Terms.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recom-

mended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—

James Topham Ogle, aged 22 ; Thomas Dallow, aged 21 ; John Hardy Coulson, aged 24 ; Robert Nicholson, aged 21 ; and W. Webb, aged 21.

The Council of the Incorporated Law Society have accordingly awarded :—

To Mr. Ogle and Mr. Webb, each the prize of books presented by the Honourable Society of Clement's Inn ; to Mr. Dallow, Mr. Coulson, and Mr. Nicholson, each one of the prizes of the Incorporated Law Society.

The Council have also awarded to each of the under-mentioned gentlemen a prize of books given by the Incorporated Law Society :—

Charles Edward Brotherton, aged 23 ; T. W. H. Hallam, aged 25 ; J. W. Pye-Smith, aged 22 ; and Joseph E. Turner, aged 21.

The examiners have also certified that the following candidates passed examinations which entitle them to commendation :—

Alfred Caddick, aged 21 ; Arthur Footner, aged 21 ; Alfred Crick Freeman, aged 23 ; W. J. Hutton, aged 22 ; Samuel H. Lewin, aged 24 ; C. Amos Lester, aged 21 ; Hervey E. Murly, aged 22 ; George James Nutt, aged 22 ; John Slade, aged 21 ; Edward Oxford Smith, aged 21 ; Harry Snow, aged 23 ; Henry Johnson Carr, aged 22 ; William Cooper, aged 23 ; George Sangster Green, aged 21 ; John Charles Harding, aged 23 ; John Edward Gray Hill, aged 23 ; William Ramwell, aged 22 ; John Hamilton Townend, aged 22.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examinations were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had been under the age of 26 :—

John Robinson Adams, aged 31 ; George Arthur Rooks, aged 28 ; Charles Sheppard, aged 29 ; Horace William Smith, aged 31 ; Frederick Stroud, aged 27 ; William Bowles Barrett, aged 30 ; William Wallis, aged 27.

The number of candidates examined in these terms were 235 ; of these 202 passed, and 33 were postponed.

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## Necrology.

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### *April.*

- 24th. CLARKE, L. T. L., Esq., Barrister.  
 27th. MAITLAND, J. GORHAM, Esq., Barrister.

### *May.*

- 1st. LEWELLIN, HENRY, Esq., Solicitor, aged 44.  
 4th. MEADOWS, DOUGLAS SPENCER, Esq., Barrister, aged 30.  
 10th. HATTEN, HENRY, Esq., Solicitor, aged 68.  
 11th. BUDD, FREDERICK, Esq., Solicitor.  
 14th. EDGELL, HARRY, Esq., Barrister, aged 69.  
 15th. FARNELL HENRY, Esq., aged 67.  
 20th. HODDING, MATTHIAS THOMAS, Esq., Solicitor.  
 25th. BAYLEY, WILLIAM KENNEDY, Esq., Barrister, aged 59.

### *June.*

- 4th. GRANT, JAMES, Esq., Barrister.  
 8th. GLOYN, N. JOHN, Esq., Solicitor, aged 65.  
 25th. RICHARDS, EDWARD LEWIS, Esq., County Court Judge,  
 aged 59.

### *July.*

- 4th. RALFE, JAMES, Esq., Solicitor, aged 86.  
 6th. COZENS, FREDERICK, Esq., Barrister.  
 14th. WILLIAMS, F. SIMS Esq., Barrister, aged 51.  
 16th. TUCKER, W. H., Esq., Solicitor, aged 28.  
 18th. TICKELL, EDWARD, Esq., Q.C., Chairman of County Meath.  
 21st. GEDGE, PETER, Esq., Solicitor, aged 25.
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## List of New Publications.

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*Austin*—Lectures on Jurisprudence; being the Sequel to "The Province of Jurisprudence Determined;" to which are added Rules and Fragments now first published from the original MSS. By J. Austin. Vols. II. and III.; 8vo., 24s. cloth.

*Ayrton*—A Treatise on the Transfer of Land Act, and the Declaration of Title Act; with the Registry Orders, Official Memorandum and Forms, and a full Index. By E. N. Ayrton, Esq., Barrister. 12mo., 14s. cloth.

*Bretherton*—A Manual of the Laws affecting the Qualifications, &c., of Parliamentary Voters. By E. Bretherton, Esq., Barrister. Post 8vo., 16s. cloth.

*Castle*—Practical Remarks upon the Union Assessment Committee Act, 1862. By H. J. Castle, Surveyor. 8vo., 5s. cloth.

*Cox*—The Institutions of the English Government. By H. Cox, Esq., Barrister. 8vo., 24s. cloth.

*Cripps*—A Practical Treatise on the Law relating to the Church and Clergy. By H. W. Cripps, Esq., Barrister. Fourth Edition. 8vo., 30s. cloth.

*Dixon*—A Digest of Cases connected with the Law of the Farm; including the Agricultural Customs of England and Wales. By H. H. Dixon, Esq., Barrister. Second Edition, with an Appendix of Cases up to the end of Hilary Term, 1863. Post 8vo., 21s. cloth.

*Fischel*—The English Constitution; translated from the Second German Edition. By R. J. Shee, Esq., Barrister. 8vo., 14s. cloth.

*Hodges*—A Treatise on the Law of Railways and Railway Companies. Third Edition. By C. M. Smith, Esq., Barrister. 8vo., 31s. 6d. cloth.

*Oke*—London Police and Magistracy. A Practical Summary of the Magisterial Powers of the Metropolitan Police Commissioners, and the Police, County, and City Magistrates, within their several Jurisdictions. By G. C. Oke. 12mo., 1s. sewed.

*Penfold*—The Union Assessment Committee Act, 1862: with Notes upon the Clauses; together with the Act to regulate Parochial Assessments, 1836, and the Circular Letter of the Poor Law Commissioners upon the New Act. By C. Penfold. 12mo., 2s. cloth.

*Petersdorff*—A Concise, Practical Abridgment of the Common and Statute Law. By Mr. Serjt. Petersdorff, assisted by C. W. Wood

and W. Marshall, Esqs., Barristers. Second Edition. Vol. V., royal 8vo., 30s. cloth.

*Phillips*—Jurisprudence. By C. S. M. Phillips, Esq., Barrister. 8vo., 12s. cloth.

*Stephen*—A General View of the Criminal Law of England. By J. F. Stephen, Esq., Barrister. 8vo., 18s., cloth.

*Stopford*—A Handbook of Ecclesiastical Law and Duty, for the Use of the Irish Clergy. By E. A. Stopford. Post 8vo., 7s. 6d. cloth.

*Tennant*—The Notary's Manual, for the Cape of Good Hope. By H. Tennant. Third Edition. 8vo., 24s. cloth.

*Tudor*—A Selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds: with Notes. By O. D. Tudor, Esq., Barrister. Second Edition. In one thick volume, royal 8vo., 42s. cloth.

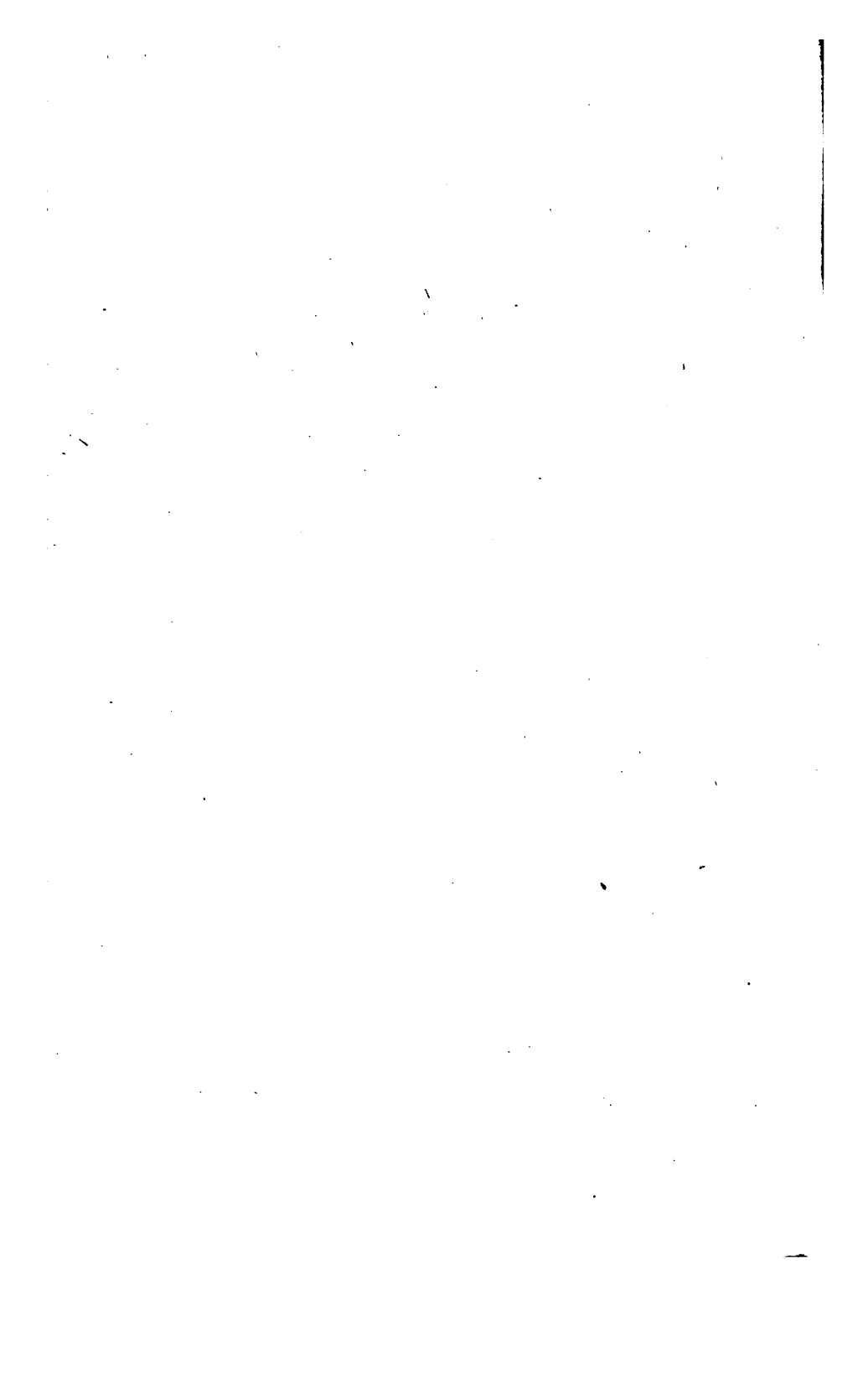
*Warren*—A Popular and Practical Introduction to Law Studies, and to every Department of the Legal Profession. By S. Warren, Esq., Q.C. Third Edition. Two volumes, 8vo., £2 12s. 6d. cloth.

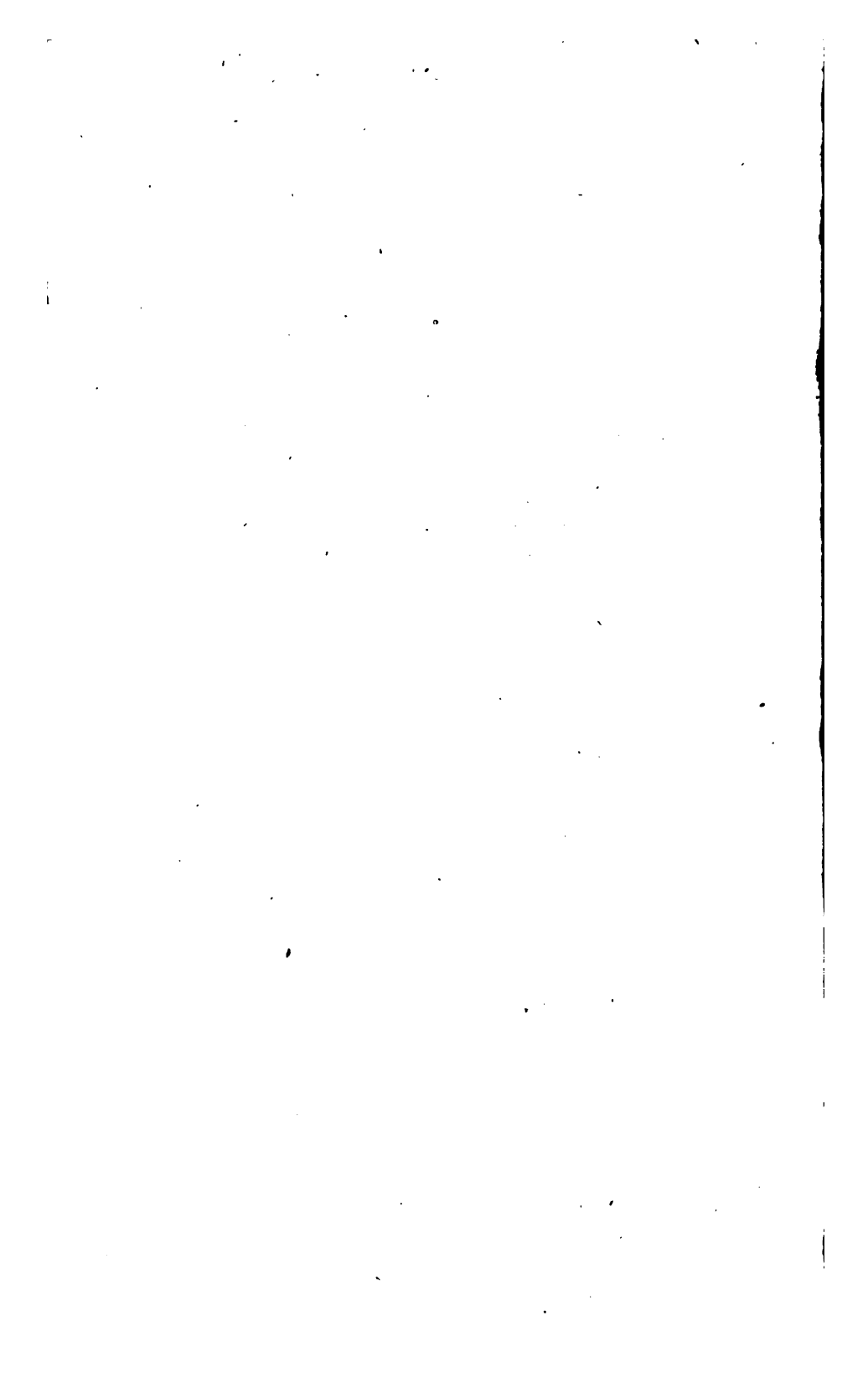
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